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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court's provision of supplemental relief to private plaintiffs in the form of a one-black-for-one-white promotion quota for state troopers constitutes a modification of the promotion requirements of two existing consent decrees and is justified by any post-decree discrimination or other changed circumstances.

2. Whether the one-black-for-one-white promotion quota imposed by the district court is permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, inasmuch as it accords preferential treatment to black applicants for promotion who have not been identified as actual victims of racial discrimination.

3. Whether the one-black-for-one-white promotion quota is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.*

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* The questions presented in this petition all relate to the first of two consolidated appeals decided together by the court of appeals; the parties are therefore listed above according to their status in that appeal, No. 84-7053. The other appeal was not a cross-appeal, as the court of appeals' caption suggests, but rather an appeal from a later district court order not involved in this petition; in that appeal, No. 84-7564, the defendants-intervenors were appellants and the other parties were all appellees.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: the United States of America, plaintiff-appellant; Phillip Paradise, Jr., and the class he represents, plaintiffs-appellees; the Alabama Department of Public Safety and its director, Byron Prescott, defendants-appellees; and V. E. McClellan, William M. Bailey, D. B. Mansell, Dan Davenport, and the class they represent, defendants-intervenors-appellees.

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UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 767 F.2d 1514. The order and memorandum opinion of the district court (App., *infra*, 55a-64a) are reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 80a-81a) was entered on August 12, 1985. On No-

vember 5, 1985, Justice Powell extended the time to petition for certiorari to and including December 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This employment discrimination case involves a challenge to a one-black-for-one-white promotion quota imposed by a district court, ostensibly pursuant to earlier consent decrees in this litigation.

1. The NAACP brought this class action suit against the Alabama state trooper force in January 1972. The United States was made a party plaintiff, and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs (Paradise) shortly thereafter.

In the initial phase of the suit, the district court determined that the Alabama Department of Public Safety and other state defendants (the Department) had engaged in a pattern and practice of discrimination in hiring; enjoined them from engaging in employment practices for the purpose or with the effect of discriminating on the basis of race or color; and ordered them to hire one black trooper for each white trooper hired until blacks comprised 25 percent of the state trooper force. *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974).[1] Three years later, in August 1975, the court granted supplemental relief after concluding that the Department had artificially re-

[1] The former Fifth Circuit explicitly limited its approval of the quota relief granted to the hiring context, "pretermit-[ting] any intimation of a position as to promotion practices" (493 F.2d at 622 n.12).

stricted the size of the trooper force and the number of new troopers hired in order to frustrate the court's 1972 order (see App., *infra*, 7a-8a). Further supplemental relief was granted in two consent decrees, one entered in February 1979 (*id.* at 71a-79a) and the other in August 1981 (*id.* at 65a-70a).

2. The 1979 consent decree resolved several issues then before the court, including the matter of promotions. The Department agreed to "have as an objective * * * an employment and promotion system that is racially neutral" (App., *infra*, 72a), and "not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks * * * [or] which discriminates on the basis of race in hiring [or] promoting" (*ibid.*). With respect to promotions, the Department specifically agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal" (*id.* at 74a). The Department also agreed, pursuant to that objective, to develop within one year from entry of the decree, and to submit for the other parties' review and the court's approval, a procedure for corporal promotions conforming with the 1978 Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290-38309, and having little or no adverse impact on blacks (App., *infra*, 74a-75a). Upon completion of validation of the promotion procedure for corporal promotions, the Department was to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major, in turn (*id.* at 75a). In the interim, the Department was to use the state merit system for all corporal promotions and to pro-

mote at least three black troopers to the rank of corporal (*ibid.*). More detailed interim procedures were set forth in an agreement between the parties and, pursuant to the consent decree and that agreement, four black troopers and six white troopers were promoted to corporal positions in February 1980.

Over two years after entry of the first consent decree, the Department moved for approval of a written examination for promoting corporals. Because the examination had not been validated in accordance with the standards set forth in the Uniform Guidelines, Paradise and the United States took the position that its use would not be justified if the results had an adverse impact on black applicants. However, in a second consent decree entered in August 1981 (App., *infra*, 65a-70a), the parties agreed that the examination would be administered and scored; that the scores would be used in conjunction with other factors to rank applicants on a promotion register; and that the promotion register would then be reviewed "to determine whether the selection procedure has an adverse impact against black applicants" (*id.* at 68a), either as to the initial group of promotions to be made or as to all promotions anticipated during the life of the register. If the selection procedure had little or no adverse impact on blacks, selections were to be made in rank order from the promotion register; if the selection procedure did have an adverse impact on blacks, the Department was to propose an alternative procedure for promotions to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure" (*id.* at 69a). If the parties could not agree on an appropriate promotion procedure, the matter was to be submitted to the court for resolution (*ibid.*).

The Department's 1981 examination was administered and scored, and a promotion register was prepared. In June 1982, the Department advised the United States that there was a current need for 8-10 promotions to corporal, and that it was anticipated that a total of 16-20 corporal promotions would be made from the 1981 promotion register. We responded by advising the Department that, in our view, rank-ordered use of the unvalidated 1981 promotion procedure would result in a substantial adverse impact on black applicants for promotion, and, accordingly, the Department should submit an alternative proposal for making promotions in conformity with the 1979 and 1981 consent decrees. No such proposal was submitted to us, and no promotions were made, during the next nine months.

3. In April 1983, Paradise filed a "motion to enforce" the terms of the 1979 and 1981 consent decrees, seeking a court order requiring the Department to promote qualified black troopers to all upper rank positions in equal numbers with white troopers until either approximately 25% of each rank above entry level is black or promotion procedures complying with the consent decrees have been developed and implemented.

The United States agreed that the consent decrees should be enforced, but opposed imposition of a one-black-for-one-white promotion quota. V. E. McClellan and three other white troopers were permitted to intervene on behalf of a class composed of the top-ranked white applicants for promotion to corporal on the 1981 promotion register (McClellan). McClellan and the Department also opposed imposition of a promotion quota.

In an order entered October 28, 1983, the district court found that use of the Department's 1981 selec-

tion procedure would have an adverse impact on blacks, prohibited its use, and ordered the Department to submit a proposal for making at least 15 corporal promotions in a manner that would not have an adverse racial impact. 580 F. Supp. 171 (M.D. Ala. 1983). The court indicated that, if the parties could not agree on a promotion plan, the issue of corporal promotions would be deemed submitted for resolution by the court pursuant to the 1981 consent decree. When the other parties objected to the proposal submitted by the Department pursuant to the court's October 1983 order, the court took the matter under advisement.

4. On December 15, 1983, the district court issued an order and memorandum opinion granting Paradise's "motion to enforce" and the relief requested. 585 F. Supp. 72 (App., *infra*, 55a-64a). The court found that as of the date of decision there were still only four blacks among the Department's upper ranks (*id.* at 60a), and that the Department was still "without acceptable procedures for advancement of black troopers" into these ranks (*ibid.*). Based on these findings, the court entered an order enjoining the Department "from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank" (*id.* at 56a).[2] The court further ordered this promotion quota to "remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the [Department has] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal

[2] On February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to this order.

requirements" (*ibid.*). Finally, the court gave the Department 35 days to submit for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level rank (*ibid.*).[3]

5. The United States, the Department, and McClellan appealed to the United States Court of Appeals for the Eleventh Circuit. On August 12, 1985, the court of appeals affirmed the district court's order imposing the one-black-for-one-white promotion quota. 767 F.2d 1514 (App., *infra*, 1a-54a). The court of appeals held that the quota order did not constitute a modification of the 1979 and 1981 consent decrees, as those decrees are concerned with the impact of proposed promotion procedures "on blacks, and blacks alone," do not prohibit procedures adversely impacting on whites, and expressly authorize plaintiffs to apply for an order enforcing their terms or providing any other appropriate relief (*id.* at 26a).

The court of appeals also held that the quota order did not exceed the district court's remedial authority

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[3] The Department submitted such a schedule, and as of this date has developed promotion procedures for corporals and sergeants. Both procedures have been approved for use on a temporary basis for a limited number of promotions, and the one-black-for-one-white quota has been temporarily suspended for purposes of those promotions. The district court's order approving the procedure for corporals was appealed by McClellan, and was affirmed by the court of appeals along with the quota order (App., *infra*, 45a-54a). Pursuant to the temporary promotion procedures approved by the district court, the Department has promoted twelve troopers, of whom three (25%) are black, to corporal and four troopers, of whom one (25%) is black, to sergeant. This case is not moot, however, since no promotion procedures have been approved for permanent use, and the one-black-for-one-white quota remains in effect with respect to all other promotions.

under Title VII (*id.* at 28a-35a), rejecting our reading of this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), as prohibiting the award of any affirmative equitable relief that benefits persons not found to have been actual victims of discrimination. While conceding that "a superficial reading of *Stotts* supports [the government's] position" (App., *infra*, 31a), the court viewed that case as "limited to its own facts, and factually and legally distinguishable from the one at bar" (*ibid.*). Specifically, it distinguished the instant case from *Stotts* on the grounds that here (1) the challenged order does not require overriding a bona fide seniority system; (2) there were judicial findings of past intentional discrimination against blacks, and the consent decrees being enforced were intended to overcome that discrimination; (3) the case was brought primarily under the Fourteenth Amendment rather than under Title VII; and (4) the case involves the enforcement of a voluntarily negotiated consent decree rather than the modification of such a decree over the objection of one of the parties.

Finally, the court of appeals held that the quota order does not violate the Equal Protection Clause (App., *infra*, 35a-42a), because of "the long history of discrimination in the Department" (*id.* at 39a), and because of "the fact that the relief now at issue was designed to remedy the present effects of past discrimination" (*id.* at 40a) and "is substantially related to the objective of eradicating [those effects] and extends no further than necessary to accomplish [that] objective" (*id.* at 41a). The court of appeals agreed with the district court that the promotion quota "is a temporary measure designed only 'to

eliminate a manifest and chronic racial imbalance' caused by the Department's conduct" (*ibid.*), and noted that "the district court's order does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper," or the promotion of any unqualified black trooper (*ibid.*); the court of appeals also reasoned that "white troopers are not barred by [the district court's order] from advancement through the ranks" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and recurring importance regarding the limitations upon the remedial authority of the federal courts in litigation involving public employers brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fourteenth Amendment to the United States Constitution. At issue here is the validity under these provisions of a racial preference accorded to individuals who have not been identified as actual victims of racial discrimination at the expense of innocent third parties. Because this Court has agreed to hear several cases raising these issues this term, we suggest that the petition for certiorari be held pending disposition of those cases.[4]

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[4] In our view, the quota order we challenge here constitutes a *modification* of the earlier consent decrees in this case (see Question Presented #1). The court of appeals, however, concluded that this quota order simply enforces the consent decrees rather than modifying them (see page 7, *supra*). That determination involves an incorrect interpretation of the consent decrees, which prohibit only procedures with an adverse impact and require the development of valid promotion procedures in accord with the Uniform Guidelines on Employee

1. This Court recently discussed the limitations that Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), imposes upon a court's remedial authority in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). This petition seeks review of one of a series of recent lower court decisions upholding quota relief and giving the Court's decision in *Stotts* what we regard as an overly narrow and improper interpretation. The Court has recently agreed to hear two of those cases, *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), and *Local 28, Sheet Metal Workers' International Association* v. *EEOC*, cert. granted, No. 84-1656 (Oct. 7, 1985). Also pending before the Court is a case challenging the validity of a similar racial preference scheme un-

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Selection Procedures. Although it was contemplated by the earlier consent decrees that specific numbers of blacks would be promoted, the one-for-one quota was greatly different, in kind and degree. Accordingly, the one-for-one quota is clearly a modification of the prior decrees because it requires more of the Department than simply avoiding such adverse impact. Thus, the issue here, as in *Stotts*, is whether a "disputed modification of a consent decree" (slip op. 13 n.9) may require racial quotas.

In any event, the modification issue is inextricably interwoven with the Title VII issue presented here because the court of appeals purported to distinguish *Stotts* on the basis that the quota order enforced, rather than modified, the earlier consent decrees. Finally, if there was no modification of the order, this case would present the issues before this Court in *Local 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), and the court of appeals' decision is erroneous for the reasons we state in our amicus brief filed there.

der the Equal Protection Clause, *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985). The views of the United States as to the validity of such racial preferences under Title VII and under the Equal Protection Clause have been expressed in a brief as amicus curiae supporting the petitioner in *Local 93* (at 6-20); in a brief on behalf of the EEOC in *Local 28* (at 21-34); in a brief as amicus curiae supporting petitioners on the merits in *Wygant* (at 6-30); and in our petition for certiorari in *Orr* v. *Turner*, No. 85-177 (filed July 31, 1985) (involving statutory and constitutional challenges to a racially preferential consent judgment) (at 12-25).

The instant case presents questions similar to those raised in *Local 93*, *Local 28*, and *Wygant*. In *Local 93*, petitioners challenge a racial preference incorporated in a Title VII consent judgment; in *Local 28*, another Title VII case, the racial preference was awarded by the court; and in *Wygant*, the racial preference under review is incorporated in a collective bargaining agreement and is challenged under the Fourteenth Amendment. In this case, we seek review of a racial preference imposed on nonconsenting parties as part of a court order purporting to enforce earlier decrees entered by consent.

The decisions in *Local 93*, *Local 28*, and *Wygant* are likely to provide substantial clarification of the principles bearing on the resolution of the second and third questions presented in this petition, so that a remand after this Court has decided these cases is likely to be merited. Alternatively, this case itself may provide the Court with an opportunity for further clarification of those principles in the wake of its decisions in the three cases it has already agreed

to hear. Accordingly, we suggest that the Court hold this petition pending disposition of *Local 93*, *Local 28*, and *Wygant*.

2. We do not repeat the discussion of the Title VII and constitutional questions contained in our briefs in *Local 93*, *Local 28*, *Wygant*, and *Orr*,[5] and add only the following observations pertaining to this case.

a. As noted earlier,[6] the court of appeals held the district court's order to be within its authority under Title VII and attempted to distinguish this case from *Stotts* on four grounds. Regarding the first "distinction," our briefs in *Local 93* (at 10-11) and *Local 28* (at 24) respond to the court of appeals' argument that *Stotts* does not apply unless seniority rights are abridged. Second, as we discuss in our brief in *Local 93* (at 12-20) and our petition in *Orr* (at 19-21), *Stotts* cannot be distinguished on the basis that the race-conscious relief is embodied in a consent decree.[7] Third, the fact that the district court here, unlike the court in *Stotts*, predicated its order on findings of

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[5] We have served copies of these filings on counsel for each of the other parties to the proceedings below.

[6] See pages 7-8, *supra*.

[7] As discussed earlier (see note 4, *supra*), the one-to-one promotion quota entered here was, in our view, "a *disputed modification* of [the earlier] consent decree[s]" (*Stotts*, slip op. 13 n.9 (emphasis added)) and thus is factually indistinguishable from *Stotts*. In any event, even if the quota order is deemed to enforce the earlier consent decrees rather than modify them, the order is nonconsensual because the decrees that were negotiated by the parties did not include promotion quotas and all parties except Paradise objected to "enforcing" the decrees in this manner.

past intentional discrimination is plainly beside the point, as we discuss in our brief in *Local* 28 (at 26). Section 706(g) broadly governs *all* relief entered in Title VII cases. Nothing in Title VII, in *Stotts*, or in any other decision of this Court even remotely suggests that the remedial power of a Title VII court differs depending upon whether the discrimination is intentional. Finally, the court of appeals' conclusion that the relief here was entered pursuant to the Fourteenth Amendment, as well as Title VII, and that this affords a basis for avoiding *Stotts*' victim-specific remedial principle is both factually and legally unsound. It seems apparent that the 1979 and 1981 promotion consent decrees that were modified (or enforced) here, unlike the initial 1972 quota order governing hiring, were premised exclusively on Title VII.[8] In any event, the court of appeals' distinction ignores the principle that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct by "restor[ing] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974).

b. The court of appeals here also found the district court's quota order to be consistent with the Equal Protection Clause of the Fourteenth Amendment. Our views on why such orders violate the Equal Protection Clause are stated in our amicus brief in *Wygant* (at 6-30). Although the quota order chal-

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[8] See App., *infra*, 74a-75a (discussing only adverse impact and the development of a valid "promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedure* [*sic*], 43 Fed. Reg. 38290 * * *"); and App., *infra*, 68a-69a (same).

lenged here represents the action of a federal court rather than the voluntary action of a state or local agency, as in *Wygant*, it nevertheless violates the Constitution's equal protection guarantees. As we argued in our brief on the merits (at 31) in *Local 28* in relation to a quota imposed in part as a civil remedy for contempt by a defendant found guilty of intentional discrimination, a federal court is no less subject to these constitutional constraints and protections of the rights of innocent third parties.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Local 93*, *Local 28*, and *Wygant*.

Respectfully submitted.

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DECEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7053, 84-7564

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS-APPELLEES

UNITED STATES OF AMERICA,
PLAINTIFF-AMICUS CURIAE-APPELLEE,
CROSS-APPELLANT

v.

BYRON PRESCOTT, as Director of the
Alabama Department of Public Safety,
DEFENDANT-APPELLANT, CROSS-APPELLEE

V.E. MCCLELLAN, ET AL., DEFENDANTS-INTERVENORS,
APPELLANTS-CROSS-APPELLEES

Aug. 12, 1985

Before FAY and ANDERSON, Circuit Judges, and GIBSON *, Senior Circuit Judge.

PER CURIAM.

In 1972, then Chief District Judge Frank M. Johnson, Jr., found that the Alabama Department of Pub-

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* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

lic Safety (the Department) "engaged in a blatant and continuous pattern and practice of" discriminating against blacks in hiring. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). Thirteen years later, the unfortunate effects of that unconstitutional discrimination still persist. These consolidated appeals involve the district court's latest attempts to integrate the Alabama state trooper force.

In case number 84-7053 (Paradise I) all parties, save the plaintiffs, appeal the December 15, 1983 order of Judge Thompson [1] enjoining the Department to promote one black trooper for each white trooper promoted to a higher rank until either 25% of the rank is comprised of black troopers or the defendants have in place a promotion plan for the rank conforming to the law and to all prior court orders and consent decrees. As a result of that order, the Department developed and implemented a plan for promotions to the rank of corporal. The court thereafter suspended operation of the December 15 order to such corporal promotions and instead allowed the Department to use its long-awaited promotional plan for that rank. Only the intervenors, in case number 84-7564 (Paradise II), appeal this order. Having carefully reviewed the record and the numerous briefs submitted by the parties and amicus curiae, we affirm the district court in both cases.

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[1] For the most part, then Chief Judge Johnson presided over this litigation until he assumed his position on the former Fifth Circuit in 1979. The case was then transferred to the docket of District Judge Varner. The case was reassigned to Judge Thompson in October, 1980, shortly after his appointment to the district court.

I. PROCEDURAL HISTORY

(a) *NAACP v. Allen:* "blatant and continuous . . . discrimination in hiring".

In January, 1972, the NAACP brought a class action suit against the Department and the Alabama Personnel Department, alleging violations of the fourteenth amendment and 42 U.S.C. §§ 1981 and 1983. The NAACP contended that the Department "systemically exclud[ed] Negroes from its employees," R.E. at 39, and that because the Department had "not abandoned its racially discriminatory hiring practices . . . the constitutional rights of the Plaintiff, its members, and the class" were abridged. *Id.* at 41. Thereafter, the United States was made a party plaintiff, and the motion by Phillip Paradise, Jr., to intervene as a party plaintiff, individually and on behalf of the similarly situated class, was granted.

After a hearing was held, the district court concluded:

> Plaintiffs have shown without contradiction that the defendants have engaged in a *blatant and continuous pattern and practice of discrimination in hiring* in the Alabama Department of Public Safety, both as to [state highway patrol] troopers and supporting personnel. *In the thirty-seven-year history of the patrol there has never been a black trooper* and the only Negroes ever employed by the department have been nonmerit system laborers. *This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.* (citations omitted).
>
> Under such circumstances . . . the courts have the authority and the duty not only to order an

> end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. (citations omitted). *The racial discrimination in this instance has so permeated the* [*Department's*] *employment policies that both mandatory and prohibitory injunctive relief are necessary* to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

NAACP v. Allen, 340 F. Supp. at 705 (emphasis added).

The district court entered a comprehensive injunctive order (1972 Order). The court enjoined the defendants from engaging in any employment practices —including promotion—for the purpose or with the effect of discriminating against any employee or applicant for employment on the basis of race. *Id.* at 706. The court, *inter alia*, also ordered the defendants to hire one black trooper for each white trooper hired until the state trooper force was comprised of approximately 25% blacks.[2] *Id.*

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[2] In a supplemental opinion the court also awarded plaintiffs attorney's fees because of the defendants' bad faith defense of the lawsuit. The court reasoned: "[D]efendants unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment . . ., *see United States v. Frazer*, 317 F.Supp. 1079 (M.D.Ala. 1970), [thus] their defense of this lawsuit amounts to unreasonable and obdurate conduct which necessitated the expense of litigation." *NAACP v. Allen*, 340 F.Supp. at 708.

In *Frazer*, then Chief Judge Johnson held that the Alabama Personnel Department, which administered the state merit system and supplied employees to all state agencies, including the Department, unconstitutionally discriminated against blacks. This finding was predicated on, among other things; (1) the defendants' systematic refusal to appoint qualified

On appeal to the former Fifth Circuit, the defendants did not challenge the finding of "blatant and continuous" discrimination in hiring; rather, they contended that the quota hiring relief ordered by the district court unconstitutionally discriminated against eligible white applicants and improperly forced the Department to pass over whites who had fared better in the testing process in favor of less qualified blacks. *NAACP v. Allen*, 493 F.2d 614, 617 (5th Cir. 1974).[3] The Fifth Circuit disagreed.

The court first addressed the constitutional issues raised by affirmative hiring relief. The court held that white applicants who had higher eligibility rankings than blacks were not denied equal protection or due process rights because unvalidated selection procedures which disproportionately exclude blacks "have not been shown to be predictive of successful job performance." *Id.* at 620. Absent validated selection procedures, the court reasoned, "it is illogical to argue that quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons." *Id.* The court further held that temporary affirmative hiring relief which resorted to racial cri-

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black applicants; (2) the defendants' practice of appointing and preferring low-ranking white applicants; (3) the defendants' discriminatory recruiting and advertising practices; and (4) the defendants' practice of segregating state employees by race in the use of facilities. *Frazer*, 317 F.Supp. 1089-90.

[3] The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981. We also are bound by decisions of Unit B of the former Fifth Circuit rendered after that date. *Stein v. Reynolds Secs., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

teria, if it were the only rational, nonarbitrary means of eradicating the present effects of past discrimination, denied no one their constitutional rights and was justified by the governmental and social interest in effectively ending unconstitutional discrimination. *Id.* at 619.

Having rejected the defendants' constitutional arguments, the court next proceeded to determine whether the district court abused its discretion in ordering quota hiring. *Id.* at 620. The court recognized that the district court was faced with "(1) clear evidence of a long history of intentional racial discrimination, (2) a paucity, if not a total absence of any positive efforts by the [Department] to recruit minority personnel, and (3) utilization of unvalidated employment criteria and selection procedures and other discriminatory practices." *Id.* Because the fourteenth amendment violation was "so clearly demonstrated," the district court was obliged "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 617 (quoting *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965)). The court accordingly upheld the district court's conclusion that quota hiring relief "was essential to make meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization." 423 F.2d at 620-21.[4]

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[4] The court relied heavily on *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974), a factually similar case involving the Mississippi Highway Patrol (MHP). In *Morrow*, a panel of the Fifth Circuit affirmed the district court's finding that

(b) *1975 Order:* The defendants purposefully frustrate or delay full relief to the plaintiff class.

The plaintiffs, in 1974, moved the district court for further relief. The hearing which was held on that motion focused on two issues: (1) whether the defendants had artificially restricted the size of the trooper force to frustrate the 1972 hiring order; and (2) the disproportionate failure of blacks hired under that order to achieve permanent trooper status. Record, Vol. 1, at 41.

The district court found that at the time it entered the 1972 Order, and at all material times thereafter, the responsible state officials recognized that there was a "critical shortage of troopers" in Alabama. *Id.* at 42. The court further found that since the 1972 Order, the Department hired fewer troopers than was necessary to offset even normal attrition. *Id.* Additionally, examination of the Department's pre- and post-1972 Order fund allocation and expenditure pat-

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the MHP unconstitutionally discriminated against blacks in hiring and employment. *Morrow v. Crisler*, 479 F.2d 960, 962 (5th Cir. 1973). The panel also upheld the district court's refusal to order affirmative hiring relief, finding that the court did not abuse its discretion. *Id.* at 963-65. In light of a supplemented appellate record, however, the en banc Court held that the district court's injunction did not order sufficient injunctive relief to eradicate the effects of the defendants' discriminatory employment practices. The Court therefore remanded the case to the district court to fashion a decree which would have the "certain" result of integrating the MHP. *Morrow v. Crisler*, 491 F.2d at 1055. The Court further held that the district court would have to order some affirmative hiring relief, such as "*temporary* one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on white hiring," *id.* at 1056, until the residual effects of past discrimination were eliminated.

terns revealed that the Department had either not spent or had diverted to other uses funds which could have been used for salaries and ancillary expenses for new troopers. *Id.* at 42-43. The court concluded:

> These findings, when combined with the considerable testimony regarding the defendants' reluctance to implement the court's remedial order by placing black troopers on the state's highways, necessitate the conclusion that the defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired.

Id. at 43.

The district court further found that the comparatively high black attrition rate (of the 40 blacks hired since the 1972 Order only 27 were still on the force, while all 29 whites hired in that period remained) was not coincidental. Indeed, the court found that the high attrition rate among blacks resulted from: (1) failure to select the best qualified blacks from the eligibility rosters; (2) official and social discrimination against blacks at the trooper training academy; (3) preferential treatment of white new hires in training and testing; and (3) harsher discipline for blacks than whites for similar misconduct while on the force. *Id.* at 44. Based on these findings, the court enjoined the defendants from artificially restricting the size of the troopers force for the purpose or with the effect of delaying or frustrating achievement of the goal of having blacks comprise 25% of the trooper force (1975 Order). *Id.*

(c) *The 1979 Partial Consent Decree:* The defendants obligate themselves to develop a promotion procedure within one year that will have little or no adverse impact on blacks.

In September of 1977, plaintiffs moved the district court for supplemental relief. After extensive discovery, a Partial Consent Decree (1979 Decree) resolving most of the disagreements between the parties was agreed to by all concerned and approved by the court on February 16, 1979. Record, Vol. 1, at 50-57.

In the 1979 Decree, the parties explicitly recognized the continuing effect of the district court's 1972 and 1975 Orders. *Id.* at 50. The defendants also agreed not to engage in any act or practice which had the purpose or effect of unlawfully discriminating against blacks. *Id.* at 50-51. With respect to promotions, the defendants agreed to develop a promotion procedure which would be fair to all applicants and have "little or no adverse impact on blacks seeking promotion to corporal." *Id.* at 53.[5] The defendants obligated themselves to accomplish this within one year from the signing of the 1979 Decree.[6] *Id.* Once the procedure

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[5] The defendants also agreed that the promotion procedure would conform with the 1978 *Uniform Guidelines of Employee Selection Procedure*, 28 C.F.R. § 50.14. These guidelines were adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission, to satisfy "[t]he Federal government's need for a uniform set of principles on the question of the use of tests and other [employee] selection procedures." *Id.* § 1A.

[6] During the period in which a new promotion procedure for the rank of corporal was being validated, the defendants agreed to use the existing state merit system for all promo-

for promotion to corporal had been validated, the defendants were to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major, in turn. *Id.* The defendants further agreed to allow plaintiffs to apply to the court for an order enforcing the terms of the 1979 Decree, or to "apply for any other relief which may be appropriate." *Id.* at 51.

(d) *Paradise v. Shoemaker:* The 1972 Order means what it says and will not be modified.

Five days after the district court approved the 1979 Decree, the defendants filed a motion to more fully define the quota relief set forth in the 1972 Order, or, in the alternative, for supplemental relief. Interpreting the motion as one seeking "clarification" of the 1972 Order, the district court gave short shrift to the defendants' argument that "state trooper" referred only to arresting officers holding entry-level positions. See *Paradise v. Shoemaker*, 470 F. Supp. 439, 440 & n. 1 (M.D. Ala. 1979). "On this point, there is no ambiguity. The Court's [1972] order required that one-to-one hiring be carried out until approximately twenty-five percent of the *state trooper force* is black." *Id.* at 440 (emphasis in original).

The district court likewise had little difficulty disposing of the defendants' alternative claim that they were entitled to supplemental relief in the form of modification of the 1972 Order.[7] The defendants ar-

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tions to that rank provided that at least three black troopers were promoted. Record, Vol. 1, at 53. Exactly how this was to be done was detailed in a document styled "Agreement of Counsel for the Parties." *Id.* at 58-59.

[7] The defendants asked the court to strike the 25% quota and to order that 1-for-1 hiring continue only until (1) a valid

gued that the affirmative hiring relief ordered by the court exceeded what was necessary to eliminate the effects of past discrimination in that the Department's promotion policy required advancement through the ranks and prohibited lateral hiring. Because, according to the defendants, the 25% objective could not be achieved unless 37.5% of entry-level positions were filed by blacks, a greater number of "more qualified white applicants" were excluded than was constitutionally permissible. *Id.* at 441.

The district court, relying on the Fifth Circuit's affirmance of the 1972 Order in *NAACP v. Allen*, 493 F.2d 614, held that modification was precluded by the law of the case doctrine. *Paradise v. Shoemaker*, 470 F. Supp. at 441. Even if the doctrine were not apposite, however, the district court discerned no constitutional reason for disturbing its prior order. *Id.* at 441-42. The court concluded:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black.* The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore

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examination was used to produce a new hiring list, or (2) 25%, or (3) 15% of the entry-level positions were filled by blacks. *Id.* at 62.

> that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. As the Fifth Circuit has recognized, the order in this case does not seek to grant proportional representation in public employment to the black citizens of Alabama. *NAACP v. Allen*, 493 F.2d at 621. The order in this case is but the necessary remedy for an intolerable wrong. Accordingly, the motion for supplemental relief will be denied.

Id. at 442 (emphasis in original).

(e) *The 1981 Consent Decree.*

More than two years after the 1979 decree was entered, the defendants, on April 13, 1981, moved the district court for approval of a new examination to be used for promotions to the corporal rank. Record, Vol. 1, at 66. After reviewing the proposed promotion procedure,[8] the plaintiffs and the United States filed a joint response objecting to approval of the proposed examination and promotional procedure. *Id.* at 83-97. They essentially maintained that the examination had not been validated in accordance with the *Uniform Guidelines*, *see supra* note 5, and that its use would not be justified if the results showed an adverse impact on blacks. A hearing was never held on the defendants' motion, however, because the parties executed another consent decree (1981 Decree), which was endorsed by the district court on August 18, 1981. Record, Vol. 1, at 101.

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[8] The proposed promotion procedure was comprised of four components weighted as follows: written test—60%; length of service—10%; supervisory evaluation—20%; service ratings—10%. *Id.* at 102; R.E. at 100.

In the 1981 Decree, the defendants acknowledged their obligation under the 1979 Decree to utilize a promotion procedure having little or no adverse impact on blacks. To avoid unnecessary liitgation, and to expeditiously establish a selection procedure for corporals, the parties agreed that defendants' proposed promotion procedure would be administered and scored. Thereafter, the promotion register would be "reviewed to determine whether the promotion procedure has an adverse impact against black applicants." *Id.* at 103. This determination was to be made by reference to the "four fifths" rule[9] set forth in Section 4D of the *Uniform Guidelines*. *Id.* at 103-04; *see* 28 C.F.R. § 50.14. If the procedure had little or no adverse impact on blacks, selections were to be made in rank order from the promotion register. Record, Vol. 1, at 104. If the parties were unable to agree whether the procedure had an adverse impact, the matter was to be submitted to the district court for resolution. *Id.* at 104. No promotions to the corporal rank were to be made pending resolution of the adverse impact issue. *Id.* If the parties agreed, or the court found, that the procedure did have an adverse impact on blacks, promotions were to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure." *Id.* The defendants were to submit an alternative proposed promotion procedure, and if the parties failed to agree on the method for making promotions, then the matter was to be

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[9] Under Section 4D of the *Uniform Guidelines*, "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 28 C.F.R. § 50.14.

submitted to the court for resolution. *Id.* No promotions to corporal were to be made unless the parties agreed on, or the court ruled upon, the method to be used for making promotions with little or no adverse impact. *Id.* at 104. In the event that the promotion procedure was deemed to have an adverse impact on blacks, the defendants agreed to examine the results to identify the sources of that impact and to revise the promotion procedure so as to avoid the problem in the future. *Id.* at 105. The defendants also agreed to give the plaintiffs data showing the impact of each component of the promotion procedure, as well as an item-by-item analysis of the impact of the written examination. *Id.* The parties were then to attempt to agree upon modifications in the promotion procedures for future administrations. *Id.* Again, if the parties were unable to resolve their differences, the matter was to be submitted to the district court for resolution. *Id.*

In accordance with the 1981 Decree, the defendants administered their written examination on October 24, 1981. The resulting promotion register indicates that of the 262 applicants for promotion to corporal, 60 (22.9%) were black. Of the 60 blacks who took the test, only 5 (8.3%) were ranked among the top half of the candidates, and of these, the highest ranked was # 80. *Id.* at 117-28. On June 21, 1982, the defendants, responding to an inquiry from the United States, stated that there was an immediate need for 8-10 promotions to corporal, and that 16-20 promotions would ultimately be made from the promotion list before the construction of a new list. *Id.* Vol. 2, at 222. The United States, by letter, objected to rank-order use of the promotion procedure, contending that, in its view, such use would result in substantial adverse impact on black applicants for

promotion to corporal. *Id.* at 220-21. The United States suggested that the defendants abide by the terms of the 1981 Decree and formulate a "proposal for making promotions in a manner that does not result in discriminatory impact on black troopers." *Id.* at 220.

(f) *The Instant Proceedings.*

Plaintiffs, on April 7, 1983, moved the district court for an order enforcing the terms of the 1979 and 1981 Decrees. Plaintiffs sought an order requiring the defendants to promote blacks to the corporal rank "at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure." Record, Vol. 1, at 112. According to plaintiffs, such an order was justified by the terms of the decrees, would "encourage defendants to develop a valid promotional procedure as soon as possible," and would "help alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department." *Id.* Plaintiffs principally relied on the results of the October, 1981, corporal examination and the fact that since the 1979 Decree had been entered, no valid promotional mechanism had been developed. Indeed, the only blacks promoted since 1972 were the four promoted pursuant to the 1979 Decree. Thus, even though blacks had been employed in the Department of 11 years, only four had advanced beyond the lowest rank.

The United States opposed imposition of a 1-for-1 promotional quota, contending that such relief was inconsistent with the 1981 Decree, went beyond the district court's remedial authority under Title VII, and was unconstitutional. Record, Vol. 2, at 195-202. The United States agreed, however, that the decrees

should be enforced by ordering some promotions, unless the defendants could show cause why such promotions should not be made.[10]

The defendants agreed with the United States that the relief sought by the plaintiffs in their motion to enforce was unconstitutional. The defendants also argued, however, that they should be given an opportunity to demonstrate that the proposed promotion procedure was valid and did not adversely impact on blacks, within the meaning of the consent decrees and the *Uniform Guidelines*.

Shortly after the motion to enforce was filed, four white applicants for promotion to corporal moved to intervene on behalf of a class composed of those white applicants who took the corporal's promotion examination and ranked # 1 through # 79. Record, Vol. 1, at 130-35. The intervenors, *inter alia*, contended that the 1979 and 1981 Decrees, as well as the relief sought by the plaintiffs in their motion to enforce, were unconstitutional, unreasonable, illegal, and against public policy. *Id.* at 131-134.

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[10] In support of enforcement, the United States noted that: (1) the defendants had yet to submit a proposal for making promotions in conformity with the 1979 and 1981 Decrees; (2) no corporal promotions had been made, despite the defendants' representation the year before that there was a "current need" for such promotions; and (3) the defendants failed to offer any reasons why promotions should not be made, nor had they offered an explanation as to why they halted progress toward remedying the effects of past discrimination. Record, Vol. 2, at 199-201. The United States maintained that the failure to promote corporals thwarted the purposes of the orders entered in the case, and that the failure to present a promotion plan in accordance with the 1979 and 1981 Decrees "suggests that a pattern of discrimination against blacks in the Department . . . may be continuing." *Id.* at 200.

The district court, on May 27, 1983, held a hearing on both the motion to enforce and the motion to intervene. In an order filed October 28, 1983, the district court allowed the intervenors to participate in the case on a prospective basis only; the court held that as to prior orders, judgments, and decrees, intervention was untimely. Record, Vol. 2, at 309-10. By separate order, also filed on October 28, the district court determined that, when judged against the 1979 and 1981 Decrees, the defendants' selection procedure adversely impacted on blacks. *Paradise v. Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983). The court noted that even if 79 corporals were promoted in rank order, rather than just the 15 the defendants stated were needed as soon as possible, none would be black. *Id.* at 173. "Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact." Id.[11]

Having held that the promotion procedure adversely impacted on blacks, the district court, pur-

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[11] The court rejected the defendants' argument that section 4D of the *Uniform Guidelines* entitled them to an opportunity to present evidence in support of their position that the selection procedure did not have an adverse impact. That section provides in part that "[g]reater differences in selection rate may not constitute adverse impact . . . where special recruiting or other programs cause the pool of minority . . . candidates to be atypical of the pool of applicants from that group." 28 C.F.R. § 50.14. The defendants contended that the 1-for-1 hiring quota was such a "special program" resulting in an atypical pool, since black troopers scored lower on a hiring test than did white troopers. *Paradise v. Prescott*, 580 F.Supp. at 173. Accepting as true the defendants' representation that blacks did not score lower on this test than whites, the court reasoned that such proof was "an unacceptable basis to rest a claim of atypicality." *Id.* at 174.

suant to the 1981 Decree, enjoined the defendants from using that procedure for promotion purposes. *Id.* at 174-175. The court also ordered the defendants to submit a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that would not have an adverse racial impact. *Id.* at 175. The court indicated that if the parties to the 1981 Decree were unable to agree on a promotion plan, "the issue of corporal promotions shall be deemed submitted for resolution by the court." *Id.*

On November 10, 1983, the Department submitted to the district court its proposed promotion procedure. Record, Vol. 2, at 356. The Department proposed to promote 15 troopers to the position of corporal, of whom 4 would be blacks. It urged that this procedure, to be used on a one-time basis only, reflected the percentage of blacks to white who took the corporal examination, and met the requirements of the four-fifths rule of the *Uniform Guidelines*. The Department also requested an order permitting the Department of Personnel a specified period of time within which to develop and submit for *prior* court approval a non-discriminatory corporal promotion procedure for use in subsequent promotions.

The plaintiffs vigorously opposed the Department's proposal. *Id.* at 382-89. They contended that the proposal "totally disregards the injury plaintiffs have suffered due to the defendants' four-and-a-half year delay [a reference to the 1979 Decree] and fails to provide any mechanism that will insure the present scenario will not reoccur." *Id.* at 382. Plaintiffs reasoned that because of the defendants' conduct, blacks were clustered at the lowest level of employment with no proper procedure for promotion to corporal in place, while the Department continued to promote whites from all-white rosters to the positions of ser-

geant, lieutenant, captain, and major. *Id.* at 382-83. Approval of the Department's procedure, the plaintiffs argued, would place the judicial imprimatur on the defendants' obdurate conduct. Plaintiffs reiterated their request for a 1-for-1 promotion requirement until a valid promotion procedure is in place. Such relief would give the defendants "an incentive to carry out their almost five-year-old obligation," *id.* at 385, and would "make up for the additional injury they have thrust upon plaintiffs for their noncompliance [with the 1979 and 1981 Decrees]." *Id.* at 384.

The United States did not oppose the Department's proposal to promote 11 whites and 4 blacks to corporal; it did, however, oppose the entry of an order which would sanction court approval of a promotion plan prior to its actual implementation. Such an order, according to the United States, would circumvent the 1981 Decree's requirement that a selection procedure be actually administered to determine if it adversely impacted on blacks. *Id.* at 423-26.

The intervenors opposed approval of any promotion plan which imposed a promotion quota. They submitted that corporal promotions should be by rank-order use of the promotion register resulting from the 1981 corporal promotional examination. *Id.* at 448.

On December 15, 1983, the district court granted the plaintiffs' motion to enforce the 1979 and 1981 Decrees. *Paradise v. Prescott*, 585 F.Supp. 72 (M.D. Ala.1983). Faced with the Department's immediate need to promote 15 new corporals, and the fact that the parties were unable to agree on a promotion procedure, the court "in accordance with" the 1979 and 1981 Decrees, *id.* at 73, undertook to "fashion a [promotion] procedure." *Id.* at 74.

The court aptly summarized the situation as follows:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

Id. (emphasis in original). The court agreed with plaintiffs that, temporarily at least, 50% of all promotions to corporal and to higher ranks must be filled by qualified black troopers. *Id.* at 75. The court also shared the plaintiffs' concern over the Department's delay in developing acceptable promotion procedures for all ranks. *Id.* The court therefore ordered the Department to promote one black trooper for each

white trooper promoted to a higher rank, if there is a black trooper objectively qualified to be promoted to the rank, until either (1) approximately 25% of the rank is comprised of black troopers, or (2) the defendants have developed and implemented a promotion plan for the rank conforming with the prior orders and decrees in the case and all other legal requirements. Record, Vol. 2 at 482-83; *see Paradise v. Prescott*, 585 F.Supp. at 75. The court also ordered the defendants to submit for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position. Record, Vol. 2 at 483.

The order was premised on the court's belief that the effects of past discrimination "will not wither away of their own accord." *Paradise v. Prescott*, 585 F.Supp. at 75. Quota relief was appropriate, the court reasoned, because such relief was necessary and reasonable. The relief was necessary because the history of this case made it clear that the "intolerable" and "egregious" racial disparities in the upper ranks of the Department would not be eradicated absent "immediate, affirmative, race-conscious action." *Id.* The quota relief was reasonable because: (1) it was a temporary measure; (2) it did not require the discharge, demotion, or replacement of any white troopers; (3) it did not require the promotion of any unqualified black trooper; (4) it did not unnecessarily trammel the interests of white troopers; and (5) it was specifically tailored to redress the present effects of past discrimination. *Id.* at 75-76. The court noted that the Department had "the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures." *Id.* at 76.

The district court, after a hearing, denied all motions to reconsider the December 15, 1983 order, to

alter or amend the judgment, and to stay enforcement of the order pending appeal. Record, Vol. 3, at 578-81. The intervenors also moved this court for a stay pending appeal. That motion was denied on February 10, 1984. The Department, the United States, and the intervenors all filed timely notices of appeal. (*Paradise I*). It appears that on February 6, 1984, eight black troopers and eight white troopers were promoted to the rank of corporal.

II. *PARADISE I*

The principal issues on appeal are as follows: (1) whether the December 15, 1983, order of the district court constitutes an improper modification of the 1979 and 1981 Decrees; (2) whether the district court's order exceeds the district court's remedial authority under Title VII, as interpreted in *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984); and (3) whether the district court's order unconstitutionally discriminates against, or unnecessarily trammels the interests of, white troopers.[12] We address these issues seriatim.

(a) Enforcement of the 1979 and 1981 Decrees

"A consent decree, although founded on the agreement of the parties, is a judgment." *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir.1981) (en

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[12] The intervenors and the Department raise a number of other arguments, most of which proceed from the erroneous assumption that the district court modified the 1979 and 1981 Decrees. We have considered all of these arguments and find them to be without merit. We pretermit any discussion of them except as they directly relate to the principal issues set forth in the text of the opinion. *See infra* notes 14 and 16.

banc). It therefore has the force of res judicata, and may be enforced by judicial sanctions, including a citation for contempt. *Id.* at 439-40. While a consent decree is a judgment, the decree also has many attributes of a contract between the parties. *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 236, 95 S.Ct. 926, 929, 43 L.Ed.2d 148 (1975). It therefore "must be construed in the light of traditional tenets of contract construction." *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 171 (5th Cir. Unit B 1981). In this regard, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971); *Stotts*, 104 S.Ct. at 2586; *Turner v. Orr*, 759 F.2d 817, 821 (11th Cir.1985); *Roberts*, 653 F.2d at 171. Appellate review of a district court's construction of a consent decree is akin to review of a district court's contract interpretation; in this aspect of the case, we thus are not bound by either the clearly erroneous rule or the abuse of discretions standard. *See Turner*, 759 F.2d at 821 (construction of consent decree is question of law subject to *de novo* review); *Eaton v. Courtaulds of North America, Inc.*, 578 F.2d 87, 90 & n. 2 (5th Cir.1978) (interpretation of consent decree may be considered afresh by appellate court; Fed.R.Civ.P. 52(a) not applicable and since issue is not whether trial court erred in approving consent decree, exercise of discretion is not in question). With these principles in mind, we have little difficulty rejecting the appellants' arguments that the district court improperly modified, rather than enforced, the 1979 and 1981 Decrees.

We initially note the district court's fidelity to the detailed procedural mechanism established in the

1979 and 1981 Decrees. The 1979 Decree, wherein the Department first obligated itself to develop within one year a promotion procedure having little or no adverse impact on blacks, allowed the plaintiffs to move the district court for an order enforcing the terms of the decree or for an order granting any other appropriate relief. *See supra* p. 1519. With the results of the 1981 corporal promotion examination in hand, the plaintiffs availed themselves of this provision. Because the parties were unable to agree on whether the examination adversely impacted on blacks, the district court was required, under the 1981 Decree, to resolve that issue. *See supra* p. 1521. In its order of October 28, 1983, the court recognized the requirements of the decrees, applied the four-fifths rule to the results of the examination, and found that the proposed promotion procedure adversely impacted on blacks. *Paradise v. Prescott*, 580 F.Supp. at 172-74. Again in keeping with the 1981 Decree, the court ordered the Department to submit a proposal for interim promotions. *Id.* at 175. The court stated that, under the 1981 Decree, the issue of promotions would be deemed submitted for resolution by the court if the parties failed to agree on a method for making promotions. *Id.*

The parties again failed to agree. With the various proposals of the parties before it, the court issued its ruling upon the method to be used for making promotions. *See Paradise v. Prescott*, 585 F.Supp. 72. The court specifically stated that "as required by the 1981 consent decree, [the parties] have requested that the court fashion a promotion procedure." *Id.* at 74.

Despite the district court's adherence to the procedural provisions agreed to by the parties to the de-

crees, the appellants claim that the December 15, 1983, other constitutes a modification of those decrees. In support of their position, they correctly note that the 1979 Decree provides that the Department agreed: (1) to have "as an objective . . . an employment and promotion system that is racially neutral," Record Vol. 1, at 50; (2) "not to engage in any act or practice which discriminates on the basis of race in . . . promoting;" *id.* at 52; and (3) to have as an objective the use of a "promotion procedure which is fair to all applicants." *Id.* at 53. We also agree with appellants that the 1981 Decree required the court to rule upon a promotion procedure "with little or no adverse impact." *Id.* at 104. The appellants reason that these provisions of the decrees prohibited the district court from ordering relief which was not racially neutral and resulted in adverse impact on *whites*.

Were we free to ignore the other provisions of the 1979 and 1981 Decrees, we might agree that the district court went beyond interpreting and enforcing the decrees. Our inquiry, however, is not confined to isolated provisions of the decrees. *See Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1011 (7th Cir.1984) (en banc) ("The relevant 'four corners' are those of the decree, not of one provision of the decree."). Indeed, we must "presume that all parts of the decree have meaning and must be construed together." *Roberts*, 653 F.2d at 171. As we have seen, the 1979 Decree required the Department to implement a promotion procedure having little or no adverse impact on *blacks* seeking promotion. *See supra* p. 1519. The Department in that decree agreed to develop such a procedure within one year, and then to develop valid promotion procedures for

the upper ranks. *See id.* These upper rank promotion procedures also were to have little or no adverse impact on *blacks*. *Id.* In the 1981 Decree, the Department reiterated its commitment to develop a promotion procedure having little or no adverse impact on *blacks*. *See supra* p. 1520. That decree also provided that "[i]f the selection procedure has little or no adverse impact against *black applicants*, selections *shall* be made in rank order." Record, Vol. 1, at 104 (emphasis added). All further references to "little or no adverse impact" obviously are references to adverse impact against *blacks* seeking promotion. Wholly absent from either decree is a prohibition on promotion procedures adversely impacting on whites. Indeed, two of the appellants expressly concede that the gravamen of the 1981 Decree concerns the effect of proposed promotion procedures on blacks, and blacks alone. *See* Brief for the United States at 21 ("[T]he primary concern of the 1981 Consent Decree is with promotion procedures as they affect *blacks*. . . .") (emphasis in original); Brief of Intervenors at 20 ("Simply stated, the 1981 consent decree strived to create a situation where promotions will be made to corporal in a way that would have little or no adverse impact on blacks.").

Significantly, the parties to the 1981 Decree agreed "that it would be in the best interest of all [concerned] to avoid unnecessary litigation and to put a selection procedure for State Trooper Corporals in place as soon as possible." Record, Vol. 1, at 102. Moreover, the parties to the 1979 Decree agreed that plaintiffs could move to enforce the decree or "for any other relief which may be appropriate." *Id.* at 51. Fairly read, the 1979 and 1981 Decrees simply did not place the substantive limitation on the dis-

trict court's enforcement authority that the appellants urge here. In our view, the district court, faced as it was with the Department's representation that promotions needed to be made immediately, did not modify the 1979 and 1981 Decrees or exceed the relief authorized by those decrees when it granted the plaintiffs' motion to enforce.[13]

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[13] The Department and the United States cite *United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), as the Supreme Court benchmark governing modification of consent decrees. In that case, the Court recognized the inherent authority of a court to modify a consent injunction if that injunction "has been turned through changing circumstances into an instrument of wrong." *Id.* at 115, 52 S.Ct. at 432. More specifically, the Court held that an injunction should not be modified at the instance of a defendant absent "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 119, 52 S.Ct. at 464. A defendant accordingly bears a heavy burden to justify modification of a valid consent judgment.

It appears, however, that a plaintiff seeking modification of a consent judgment generally bears a lighter burden. In *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968), the Court drew a sharp distinction between a case where the defendant, as in *Swift & Co.*, seeks to escape the impact of a decree, and a case where a plaintiff seeks modification of a decree to achieve the purposes of the provisions of the decree. *Id.* at 249, 88 S.Ct. at 1499. In the latter situation, a court may have the duty to modify the decree to avoid frustration of the decree's purposes. *See id.* at 251-52, 88 S.Ct. at 1501 ("If the decree has not, after 10 years, achieved its 'principal objects' . . . the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough.)" In short, were we to construe the plaintiffs' motion to enforce as a motion to modify, we probably would not be constrained by the rigorous *Swift & Co.* standard. *See Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984) (consent decree may be

(b) *Firefighters Local Union No. 1784 v. Stotts*

The appellants argue that even if the district court's December 15, 1983, order merely enforced the terms of the 1979 and 1981 Decrees, reversal is appropriate because the district court exceeded its remedial authority under Title VII. Appellants insist that after *Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483, a district court may not award affirmative equitable relief that benefits persons not found to have been actual victims of discrimination. Since in this case there never has been a finding of discrimination in promotions, and, perforce, no specific victims of promotion discrimination have been identified, the appellants contend that the district court erred in granting plaintiffs' motion to enforce the consent decrees. Having carefully reviewed the *Stotts* decision and cases interpreting it, we conclude that appellants read *Stotts* too broadly.

The *Stotts* case arose out of a class action filed in 1977 by black employees of the Memphis, Tennessee fire department. Plaintiffs charged that the fire department engaged in a pattern or practice of making

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modified if "significant time has passed and objectives have not been met").

Even if the district court's December 15, 1983 order is properly viewed as a modification of the 1979 and 1981 Decrees, a good case could be made for affirmance. When that order was issued, nearly five years had passed since the 1979 Decree had been entered. Yet the 1979 Decree had not achieved its objectives of having in place promotion procedures for all ranks in the trooper force. Indeed, the Department had failed to implement a promotion procedure having little or no adverse impact on blacks for the rank of corporal. In light of our holding that the district court did not modify the consent decree, however, we need not decide whether modification was warranted in the absence of an evidentiary hearing.

hiring and promotion decisions on the basis of race, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981 and 1983. *Stotts*, 104 S.Ct. at 2581. Prior to trial, the case was settled by a consent decree wherein the fire department agreed to promote certain individual firefighters, and also agreed to eventually increase minority representation in all job classifications to reflect the proportion of blacks in the relevant labor force. Toward this end, interim hiring and promotional percentage goals were established. The defendant did not, however, admit that any allegation in plaintiffs' complaint was true, nor did the consent decree mention what would happen in the event of layoffs. *Id.*

A little more than a year after the consent decree was entered, the City announced the fiscal problems necessitated a reduction in non-essential personnel. Layoffs were to be made according to the "last hired, first fired" rule of the city-wide seniority system. Plaintiffs sought relief in the district court to protect the advances by blacks made since the entry of the consent decree. Because the court found that the City's seniority system was not bona fide, and that the proposed layoffs would have a racially discriminatory effect on blacks, it enjoined the City from applying the "last hired, first fired" rule to the extent that it would decrease the percentage of blacks then employed in certain job classifications. *Id.* at 2582.

On appeal, the Sixth Circuit affirmed even though it disagreed with the district court's finding that the seniority system was not bona fide. 679 F.2d 541, 551 n. 6 (6th Cir.1982). The court of appeals reasoned that the district court's injunction enforced the terms of a valid consent decree, *id.* at 561, and, in any event, was a valid modification of the decree. *Id.* at 562-64.

The Supreme Court reversed. The Court stated that the issue at the heart of the case was "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Stotts*, 104 S.Ct. at 2585 (footnotes omitted).

The Court first rejected the Sixth Circuit's holding that the injunction merely enforced the terms of the consent decree. *Id.* at 2585-86. The Court also found erroneous the Sixth Circuit's confusion that the injunction was a proper modification of the consent decree even though the modification conflicted with the City's bona fide seniority system. The Court noted that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), immunizes a bona fide seniority system from a Title VII challenge absent proof of an intention to discriminate. *Stotts*, 104 S.Ct. at 2587. The Court also relied on *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976), and *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Those cases, the Court stated, made it clear that: (1) individual members of a class may be awarded competitive seniority if they can prove that they have been actual victims of a discriminatory practice; and (2) even where an individual proves that the discriminatory practice had an impact on him, he is not automatically entitled to the displacement of a nonminority employee to make room for him. *Stotts*, 104 S.Ct. at 2588. The Court reasoned that since there was no finding that blacks protected from layoff had never been discriminated against, and since no blacks had been awarded competitive seniority, the

Sixth Circuit "imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.*

The Court also held that the injunction was not permissible as a valid Title VII remedial order. The Court stated that the *Teamsters* holding that competitive seniority can be awarded only to actual victims of illegal discrimination is consistent with the policy behind § 706(g), 42 U.S.C. § 2000e-5(g). The policy of that remedies provision "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, 104 S.Ct. at 2589.

We concede that a superficial reading of *Stotts* supports appellants' position. We view that case, however, as limited to its own facts, and factually and legally distinguishable from the one at bar.

First, as the Supreme Court itself was careful to note, the central issue in that case concerned the district court's authority to override a bona fide seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. Here, the order under review involves promotions, not layoffs pursuant to a bona fide seniority system. Section 703(h) of Title VII simply is not a controlling factor in this case. *See Turner*, 759 F.2d at 824 ("there is no contention that a bona fide seniority system will be affected by the [remedy authorized by the consent judgment];" *Stotts* is therefore distinguishable); *EEOC v. Local 638 Sheet Metal Workers' International Ass'n*, 753 F.2d 1172, 1186 (2d Cir.1985) (remedies at issue were not "in direct conflict with a bona fide seniority plan that was

protected by § 703(h) of Title VII;" *Stotts* is therefore distinguishable), *petition for cert. filed*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 53 U.S.L.W. 3842 (U.S. April 16, 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985) (consent decree did not have "the direct effect of abrogating a valid seniority system to the detriment of non-minority workers;" *Stotts* is therefore distinguishable); *Kromnick v. School District*, 739 F.2d 894, 911 (3d Cir.1984) ("no override of a bona fide seniority plan, and no requirement of race-conscious layoffs;" *Stotts* is therefore distinguishable), *cert. denied*, —— U.S. ——, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *see also Deveraux v. Geary*, 596 F.Supp. 1481, 1485 (D.Mass.1984) (*Stotts* "opinion [is] limited to a discussion of layoffs made in violation of a bona fide seniority system.").

Second, the defendant in *Stotts* never admitted that it had engaged in intentional discrimination. Here, there are judicial findings that the Department was so successful in its intentional exclusion of blacks from its ranks, that in the 37 years preceding the institution of this action the Department did not have a single black on its state trooper payroll. *See EEOC*, 753 F.2d at 1186 (*Stotts* distinguishable because there was a finding of intentional discrimination against nonwhites); *NAACP v. Detroit Police Officers Ass'n (DPOA)*, 591 F.Supp. 1194, 1202 (E.D.Mich. 1984) (same). Moreover, the 1979 and 1981 Decrees enforced by the district court were entered to overcome the manifest and chronic effects of the outright and total exclusion of blacks.

Third, *Stotts* was primarily a Title VII action. Here, the case was brought under the Fourteenth Amend-

ment. *See Detroit Police Officers Ass'n (DPOA)*, 591 F.Supp. at 1202 ("*Stotts* and the Title VII cases relied upon by the Supreme Court there rest on interpretations of Congressional intent in enacting Title VII, and contain no interpretation of the Fourteenth Amendment.").

Fourth, assuming this case is properly viewed as a Title VII case, *Stotts* did not involve the enforcement of a voluntary negotiated consent decree. Rather, that case "dealt with the power of a court to *modify* a consent judgment over the objection of one of the parties." *Turner*, 759 F.2d at 824 (emphasis added); *see Stotts*, 104 S.Ct. at 2587 n. 9 ("[A] district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute."). We have held here, however, that the district court's order was fully authorized by the 1979 and 1981 Decrees. *See Turner*, 759 F.2d at 824.

Regardless of the scope of section 706(g) of Title VII, relied upon by the Court in *Stotts*, that section "does not limit the remedies to which parties may voluntarily agree under a consent judgment." *Id.*; *see Vanguards*, 753 F.2d at 487-88. Several decisions since *Stotts* make this unmistakably clear. This court stated in *Turner* that neither Section 706(g) nor the *Stotts* case, prevents a court from approving a consent decree that provides relief which is consistent with, but goes beyond, that authorized in the underlying statute. *Turner*, 759 F.2d at 824-26. Surely the district court's order enforcing the terms of the 1979 and 1981 Decrees is consistent with the purposes of Title VII. *See id.* at 826. Similarly, in *Vanguards* the Sixth Circuit had little difficulty upholding a voluntary affirmative action plan approved by

the district court over the objection of a local union even though the seniority rights of non-minority employees were abridged. The court noted that *Stotts* did not hold that "consent decrees must strictly conform to the scope of relief available to a court in a wholly coercive action." *Vanguards*, 753 F.2d at 488. To hold that Title VII forbids voluntary affirmative action by an employer to the detriment of seniority rights of white employees would be to hold that *Stotts* overruled *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). *Vanguards*, 753 F.2d at 487-88. This the Sixth Circuit was not prepared to do. The *Vanguards* decision is consistent with another post-*Stotts* Sixth Circuit case. In *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir.1984), *cert. granted*, —— U.S. ——, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985), the court upheld a race-conscious layoff formula contained in a collective bargaining agreement between the board of education and the teachers union. Relying on *Weber*, the court characterized the formula as a valid "voluntary, race-conscious affirmative action plan," *id.* at 1158, which was "easier to defend in [court] than [a plan] mandated ab initio by federal trial courts." *Id.* at 1159; *accord*, *Kromnick*, 739 F.2d 894; *see also Britton v. South Bend Community School Corp.*, 593 F.Supp. 1223, 1230 (N.D. Ind.1984) (collectively bargained "no minority layoff clause" survives *Stotts* challenge).

Based on the foregoing, we conclude that the district court's order enforcing the 1979 and 1981 Decrees is not rendered invalid by the *Stotts* decision. The district court's order will not be reversed simply because black troopers promoted under it have not

been identified as specific victims of unlawful discrimination.[14]

(c) The Fourteenth Amendment

The intervenors claim that the district court's order enforcing the 1979 and 1981 Decrees violate their constitutional right to equal protection. We disagree.

The Supreme Court squarely confronted the constitutionality of race-conscious affirmative action plans in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 750 (1978). Unfortunately, "[n]o clear consensus emerged from the Court's decision." *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida*, 723 F.2d 846, 850 (11th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Nor did *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), produce a majority opinion on the equal protection issue. Hence, "determining what [equal protection reverse discrimination] 'test' will eventually emerge from the Court is highly speculative." *South Florida Chapter*, 723 F.2d at 851; *see also Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir.) ("The Supreme Court has not provided the kind of guidance in the constitutional context that [it has] under Title VII"), *modified*, 712 F.2d 222 (6th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.) ("There is no [Supreme Court] consensus on what findings of

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[14] Given our holding, the district court's failure to hold an evidentiary hearing to determine whether or not the black troopers to be promoted under the plaintiffs' motion to enforce had in fact been discriminated against does not constitute reversible error.

past discrimination justify remedial action"), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir.1980) ("We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over [150] pages of United States Reports, the Justices have told us mainly that they have agreed to disagree"), *aff'd in part and vacated in part and remanded*, 664 F.2d 435 (5th Cir. 1981) (en banc). In spite of the absence of a definitive Supreme Court standard on this issue, however, we recently stated with confidence:

> "At this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effects of past discrimination." *United States v. City of Miami, Fla.*, 614 F.2d 1322 (5th Cir. 1980), *modified* 664 F.2d 435 (5th Cir. 1981)." "Without race and sex consciousness, the effects of past racial and sexual discrimination cannot be eradictated. Many cases have held racial and sexual goals to be appropriate." *United States v. City of Alexandria*, 614 F.2d 1358, 1365 (5th Cir.1980).

Palmer v. District Board of Trustees, 748 F.2d 595, 600 (11th Cir.1984) (footnotes omitted).

In *City of Alexandria*, 614 F.2d 1358, this court's predecessor held that the district court erred in not approving a consent decree which established long-term and interim employment goals for blacks and women. The court concluded that "goals and targets are acceptable under the Constitution . . . so long as they are reasonably related to the legitimate state

goal of achieving equality of employment opportunity." *Id.* at 1363 (footnote omitted). In fleshing out the "reasonableness" requirement, the court enumerated three factors which should be taken into account: (1) whether the remedial relief is temporary "and will terminate when the manifest [racial] imbalances have been eliminated;" (2) whether the relief establishes "an absolute bar to the advancement of white[s];" and (3) whether the relief will benefit only "qualified" persons. *Id.* at 1366.

More recently, in a different context, this court enunciated a somewhat different standard. In *South Florida Chapter*, 723 F.2d 846, we had occasion to examine the constitutionality of a county ordinance granting preferential treatment to blacks in the contract bidding process. We held that in the circumstances of that case, a minority "set aside" provision and a minority "goals" provision were constitutional. For our purposes, the analysis employed in that case is more important than the result reached.

We recognized the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action. See *id.* at 850-52. After examining the various opinions found in *Bakke* and *Fullilove*, we concluded that the appropriate standard of review should account for the concerns common to the various views expressed in those two fragmented decisions. Using this approach, we concluded that legislation employing benign racial clasifications generally will be upheld if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of

remedying the present effects of the past discrimination. *Id.* at 851-52. Although not a formal "test," the approach used in *South Florida Chapter* was viewed as an attempt "to balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.* at 852.

After *South Florida Chapter* was handed down, we decided *Palmer*, 748 F.2d 595. Although in *Palmer* the constitutional issue was not the subject of appeal, we suggested that an approach of the "type" outlined in *Valentine*, 654 F.2d 503, might have been appropriate if the constitutional issue had been presented. *Palmer*, 748 F.2d at 600 n. 14. In *Valentine*, the Eighth Circuit held that after a competent body has made findings of past discrimination, the constitutional inquiry is "whether the affirmative action plan is 'substantially related' to the objective of remedying prior discrimination." *Valentine*, 654 F.2d at 510; *see Palmer*, 748 F.2d at 600 n. 14. More specifically, the Eighth Circuit stated:

> A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from

> all vacancies or otherwise unnecessarily or invidiously trammel their interests.

Valentine, 654 F.2d at 510.[18]

A review of the foregoing authorities convinces us that the differences between the various approaches are more of phraseology than of substance. In any event, we need not choose among them since, under either the *City of Alexandria*, *South Florida Chapter*, or *Valentine* approaches, the district court's order enforcing the 1979 and 1981 Decrees does not deprive the intervenors of their right to equal protection.

First, the long history of discrimination in the Department cannot be denied. In 1972, when the district court ordered quota hiring, the court noted that

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[18] The Sixth Circuit has adopted a similar approach, concluding that the only clear consensus to be garnered from *Bakke* and *Fullilove* is that an affirmative action must (1) serve some governmental interest, and (2) must somehow be directed toward the achievement of that objective. *Bratton*, 704 F.2d at 885. The Sixth Circuit's approach is essentially two-tiered. First, because the government has a significant interest in ameliorating the effects of prior discrimination, remedial action may be taken towards that end. *Id.* at 886. Second, remedial actions pass constitutional muster if the measures employed are reasonable. *Id.* at 887. "Reasonableness" is determined by examining the facts of the case to see "whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives." *Id.*; *see Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 694 (6th Cir. 1979), *cert. denied*, 452 U.S. 983, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *see also Wygant*, 746 F.2d at 1157 (quoting *Wygant v. Jackson Bd. of Educ.*, 546 F.Supp. 1195, 1201 (E.D.Mich 1982)) ("The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation.").

"[i]n the thirty-seven year history of the patrol there has never been a black trooper." *NAACP v. Allen*, 340 F.Supp. at 705. In 1975, the district court found that "the defendants have, for the purposes of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." Record, Vol. 1, at 43. In 1979, when the defendants sought clarification or modification of the 1972 Order, the district court found that the effects of defendants' discrimination pervaded all levels of the Department. *Paradise v. Shoemaker*, 470 F.Supp. at 442. The court noted that the quota relief it ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry-level trooper. Yet, "out of the 232 state troopers at the rank of corporal or above, *there is still not one black.*" *Id.* (emphasis in original). To agree with defendants that the quota relief applied only to entry-level positions would be to "ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Id; see supra* p. 1520. Faced with this poor track record, as well as additional allegations of discrimination, the Department agreed to the 1979 and 1981 Decrees which were enforced by the district court in its December 15, 1983, order. As we have held, those decrees which were adopted as orders of the court, fully authorized the promotion quota now at issue. *See supra* Part II.(a). Just as clear is the fact that the relief now at issue was designed to remedy the present effects of past discrimination. *See Paradise v. Prescott*, 585 F.Supp. at 75.

The district court's requirement that the promotion quota remain in effect until either 25% of the

rank is black or until a proper promotion procedure for that rank has been developed or implemented also was appropriate. The same ratio for hiring was ordered in the 1972 Order, and that ratio was affirmed on appeal. *NAACP v. Allen*, 493 F.2d 614. Additionally, the district court's 1975 Order made it clear that the 25% requirement was applicable for *all* ranks of the trooper force. *Paradise v. Shoemaker*, 470 F.Supp. 439; *see supra* p. 1519.

The district court's order enforcing the consent decrees also is substantially related to the objective of eradicating the present effects of past discrimination, and extends no further than necessary to accomplish the objective of remedying the "egregious" and long-standing racial imbalances in the upper ranks of the Department. *Paradise v. Prescott*, 585 F.Supp. at 75. As the district court observed, its order is a temporary measure designed only " to eliminate a manifest and chronic racial imbalance" caused by the Department's conduct. *Id.* at 76. The promotion quota will cease to exist when the percentage figure has been met, or the Department succeeds in doing what it promised to do years ago. Additionally, the district court's order does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper. *Id.* Moreover, only qualified black troops may be promoted pursuant to the order, and white troopers are not barred by it from advancement through the ranks. *Id.* Finally, the promotion quota ordered by the district court extends no further than necessary to ameliorate the present effects of the Department's past discrimination, effects which, as the history of this case amply demonstrates, "will not wither away of their own accord." *Id.* at 75.

We conclude that the district court's order enforcing the consent decrees is eminently reasonable given the history of this case. While the concern of intervenors' is understandable, we are not prepared to upset the considered judgment of the district court that "without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated." *Id.* at 76. Intervenors have not been denied their constitutional rights to equal protection by the district court's order enforcing the 1979 and 1981 Decrees.[16]

(d) Title VII

The intervenors also assert that the district court erred in not allowing them to present evidence on the

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[16] Similar to their contention regarding Title VII and the *Stotts* case, intervenors and the Department argue that the district court's order enforcing the decrees is unconstitutional since there is no evidence in the record that the Department has intentionally discriminated against black troopers seeking promotions. We disagree for essentially two reasons. First, these appellants assume that the district court's order amounts to a disputed modification of the 1979 and 1981 Decrees. We have held, however, that the district court merely enforced the terms of those decrees. *See supra* Part II(a). Second, it is no answer in this case to say that plaintiffs have not proven that the Department has discriminated against blacks above the entry-level seeking promotions; there were no blacks holding such positions until 1979, and even then the only black troopers promoted obtained their promotions pursuant to the 1979 Decree, not the voluntary action of the Department. On the other hand, it cannot be gainsaid that white troopers promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks. We conclude that, in these circumstances, a finding of departmental discrimination against blacks in promotions was not a necessary predicate for granting the plaintiffs' motion to enforce.

"harsh impact" that the imposition of a promotion quota would have on them. Brief of Intervenors at 30. They argue that, notwithstanding the district court's finding to the contrary, the order enforcing the consent decrees "unnecessarily trammel[s] their interests." *Id.* The Department, whose standing to raise this issue is questionable, joins the intervenors on this issue.

The Supreme Court, in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), upheld against a Title VII challenge a voluntary affirmative action plan established by the USWA and Kaiser Aluminum & Chemical Corp. The collectively-bargaining plan set percentage hiring goals for blacks, and established training programs which reserved a specified percentage of openings for blacks. *Id.* at 198-99, 99 S.Ct. at 2724-25. The court held that "Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208, 99 S.Ct. at 2729. The Court declined, however, to pronounce a bright line test for judging the permissibility of voluntary affirmative action plans. The Court simply held that the Kaiser-USWA plan was permissible under Title VII. The Court did, however, identify several factors it found important: (1) the purposes of the plan —to eliminate old patterns of racial segregation and hierarchy and to open to black jobs traditionally reserved for white only—mirrored those of Title VII; (2) the plan did not unnecessarily trammel the interests of white employees by requiring their discharge and replacement with black employees; (3) the plan did not foreclose the advancement of white

employees; and (4) the plan was a temporary measure. *Id.* at 208, 99 S.Ct. at 2729.

The district court concluded that the relief it ordered pursuant to the 1979 and 1981 Decrees was permissible under *Weber*. *See Paradise v. Prescott*, 585 F.Supp. at 75-76. The intervenors complain, however, that the district court had before it an inadequate factual basis to make that conclusion. Intervenors' position is untenable.

We initially note that intervenors failed to present this issue to the district court when the best opportunity to do so was presented. During the hearing on plaintiffs' motion to enforce and the intervenors' motion to intervene, held on May 27, 1983, the district court made it clear that one purpose of the proceeding was to "determine whether or not [the introduction of] evidence would be appropriate." Tr. at 34. Counsel for the intervenors, however, devoted the bulk of his argument to his clients' contention that the motion to enforce could not be granted absent evidence that blacks to be promoted were actual victims of unlawful discrimination. We have seen, however, that such evidence was not necessary to justify enforcement of the 1979 and 1981 Decrees. *See supra* Part II.(b). Counsel for intervenors did not at that time request an evidentiary hearing to determine whether the relief sought in plaintiffs' motion would unnecessarily trammel their interests.[17]

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[17] We admit that intervenors were in a somewhat ambiguous position at this hearing in that the court was hearing argument on the need for evidence vis a vis plaintiffs' motion to enforce as well as on the motion to intervene. The fact remains, however, that intervenors were painfully aware of the motion to enforce and the relief sought therein for quite some time. We agree with the district court's response to

In any event, we conclude that the district court had before it an adequate factual basis to resolve the *Weber* issue. It is clear beyond cavil that the district court's order enforcing the 1979 and 1981 Decrees is consistent with the purposes of Title VII does not unnecessarily trammel the interests of intervenors by requiring their discharge and replacement with black troopers, does not absolutely bar their promotion to corporal, and is a temporary measure intended to eliminate a manifest racial imbalance. *See Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. Under these circumstances, the district court was not required to hold an additional evidentiary hearing.

III. *PARADISE II*

Shortly after the district court entered the order appealed from in *Paradise I*, the Department, pursuant to that order, filed its schedule for developing promotion procedures for all ranks above the entry level position. Record, Vol. 3 at 569-70. That schedule was approved by the district court. *Id.* at 627. Thereafter, on June 19, 1984, the Department filed a statement of completion of selection procedure for promotion to the rank of corporal and a motion to approve the procedure. Record, Vol. 1, at 9 and 12, No. 84-7564. The court directed the other parties to submit written responses to the Department's motion, and set the matter for a hearing, which was held on July 3, 1984.

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intervenors' suggestion that they were unable to respond to plaintiffs' motion until the court had ruled on the motion to intervene: "Haven't you had the file before you? Haven't you had an opportunity to go through it? This is not an evidentiary hearing, you know the motion was filed, and you've read it. I'll hear you on it." Tr. at 25.

Briefly put, the proposed selection procedure was comprised of the following: (1) administration of a written examination to all candidates for promotion; (2) preliminary ranking of all candidates based on examination scores and service ratings; (3) certification of the top-ranked candidates for structured oral interviews; and (4) evaluation of each certified candidate, based on his or her interview, as "best qualified," "highly qualified," "qualified," or "not qualified." All candidates within each of these categories were to be equally eligible for promotion. The Department, which had administered the proposed selection procedure prior to the filing of its motion, wished to begin making promotions from among the 13 "best qualified" candidates.

The written examination was given to 256 candidates, of whom 179 (69.9%) were white and 77 (30.1%) were black. Before the examination was given, the Department had decided to use the written examination and service rating as a screening device to determine who would be certified for oral interviews. If 15% of the top 25% of those participating in the initial portion of the promotion procedure were black, the Department planned to certify the top 25% as eligible for oral interview. A preliminary ranking of test scores and service ratings, however, revealed that of the top-ranked 64 (25% of 256) candidates only three were black (4.7% of 64). To insure that 15% of the top 25% were black, and to avoid passing over any white candidates to achieve this objective, the Department decided to certify the top 116 candidates. Of these, 105 (90.5%) were white and 11 (9.5%) were black. The difference in scores between the white candidate ranked # 64 and the black candidate ranked # 116 was 1.2 points out of a total of

100 possible points (96.25 and 95.05, respectively). Intervenor Bailey ranked # 14 with a score of 98.37, intervenor McClellan ranked # 33 with a score of 97.27, intervenor Davenport ranked # 53 with a score of 96.69, and intervenor Mansell ranked # 56 with a score of 96.62.

The oral interview panel consisted of three persons. The panel asked the candidates six structured questions. Each member of the panel then independently rated the responses of each applicant. As a result of the interviewing process, 13 candidates—10 white and 3 black—were rated "best qualified;" 51 candidates—46 whites and 5 black—were rated "highly qualified;" 46 candidates—43 white and 3 black—were rated "qualified;" and 4 candidates, all white, were rated "not qualified." Two white candidates did not appear for their interviews. Of the three black candidates among the top-ranked 64 candidates in the preliminary ranking, one was rated "best qualified" and the other two were rated "highly qualified." Of the 61 white candidates among the 64, eight were rated "best qualified;" 29 (including intervenors Bailey and McClellan) were rated "highly qualified;" 22 (including intervenor Mansell) were rated "qualified;" and 2 (including intervenor Davenport) were not rated in any of these three categories. The 3 black candidates among the "best qualified" candidates were originally ranked # 34, # 68, and # 76. The ten white candidates in this category originally ranged from # 2 to # 102. As is apparent, there is no readily discernible correlation between a candidate's preliminary ranking before the oral interviews and his or her final rating.

As we have seen, the Department indicated that it intends to promote only those in the "best qualified"

list. When the "best qualified" list is exhausted, the Department will administer a new examination and candidates will be interviewed.

The plaintiffs and the United States suggested that the Department be permitted to employ the proposed selection procedure, but that any approval of further use of the procedure be withheld pending discovery and a hearing on the validity of the procedure. The intervenors, however, objected to any use of the Department's proposed selection procedure pending discovery and a final determination of the content validity of the procedure.

The district court, on July 27, 1984, ruled on the Department's motion. The court allowed the Department to select corporals in a nondiscriminatory manner from the candidates rated "best qualified" and suspended the 1-for-1 corporal promotion quota as to any such promotions. Record, Vol. 1, at 116, No. 84-7564. The court ordered the defendants to give notice to all parties of any proposed corporal promotions at least 5 days prior to the effective date of promotion. If a party objects to a proposed promotion, the promotion will be stayed until further order of the court. *Id.* The court gave the parties leave to conduct discovery on the issue of whether the selection procedure is valid as job-related under the *Uniform Guidelines* and in compliance with the 1979 and 1981 Decrees. *Id.* at 117. The court indicated that it would conduct further proceedings to determine whether future administrations of the Department's proposed selection procedure may be used without judicial intervention, and enjoined corporal promotions other than from the 13 "best qualified" candidates. *Id.*

Only the intervenors appealed the July 27, 1984 order. Thereafter, the Department notified the other

parties of their intention to make nine corporal promotions from the "best qualified" list. The intervenors objected, and moved the district court to stay operation of the July 27 order and any promotions made under it. *Id.* at 168-71. The district court denied the motion for stay, and the promotions subsequently were made.

(a) Issues

Although intervenors raise a number of issues on appeal, we agree with the United States that the only issue properly before this court is whether the district court's July 27, 1984 order exceeds the district court's remedial authority or otherwise violates the law.[18] For the reasons which follow, we affirm.

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[18] The intervenors devote most of their argument to an attack on the 1979 and 1981 Decrees. They argue that these decrees, which serve as "charters" for all promotional procedures to be developed by the Department, Brief of Intervenors at 13, No. 84-7564, are unlawful in that they sanction prospective race-conscious relief to individuals who have not been shown to be victims of discrimination. Intervenors also argue that these decrees have been rendered invalid by *Stotts*, and violate their constitutional rights and rights under the state merit system. Intervenors finally contend that, in light of *Stotts*, the decrees must be modified. Although most of these arguments probably have been answered by our resolution of *Paradise I*, we agree with the appellees in this case that the validity of the 1979 and 1981 Decrees is not properly before this court.

Intervenors correctly note that since they were not parties to the 1979 and 1981 Decrees, it cannot be said that they consented to the terms of those decrees. *See Stotts*, 104 S.Ct. at 2586; *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985). The intervenors nonetheless have not appealed the district court's ruling that they "may participate in these proceedings on a prospective basis only and *may not challenge previously*

(b) Discussion

The intervenors argue that the district court's approval of the Department's promotion procedure "extends beyond the remedial authority allowed . . . by § 706(g) of Title VII, . . . is inconsistent with . . . *Stotts*[,] and . . . violates the rights of the intervenors guaranteed by the United States Constitution and both federal and state law." Brief of Intervenors at 18. In their view, the promotion procedure is unlawful because it was designed to guarantee preferential treatment to persons not proven to be victims of discrimination. The intervenors suggest

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entered orders, judgments, and decrees since intervention is untimely as to these." Record, Vol. 2, at 309. The soundness of that ruling accordingly is not before us, though we would be hard-pressed to reverse it in light of recent circuit precedent. *See Reeves*, 754 F.2d 965. It is one thing to say that the July 27, 1984 order violates their rights or exceeds the court's authority; it is quite another to say the same about the 1979 and 1981 Decrees.

Intervenors also argue that the 1979 and 1981 Decrees should be modified. Quite apart from the fact that the intervenors are in this action on a prospective basis only, curiously absent from the record is any indication that a motion seeking modification has been submitted to the district court. In their proposed opinion and order submitted to the district court after the July 3, 1984 hearing on the Department's motion, the intervenors proposed that they "should be allowed the right to file appropriate pleadings seeking a modification of those consent decrees." First Supp. Record, Vol. 1, at 3. The intervenors, however, also expressly stated that consideration should be given to modifying the decrees only at a future hearing, and then only "if appropriate pleadings are filed." *Id.* In the order appealed from, the district court neither acknowledged the intervenors alleged right to modify the decrees, nor did it deny them that right. Since *no party* has asked the district court to modify the decrees, that issue is not properly before us.

that because the Department was operating under the 1979 and 1981 Decrees, "some number of promotions were . . . guaranteed or assigned for blacks." *Id.* at 9.

The intervenors identify two points in the promotion procedure wherein impermissible quotas allegedly were imposed: when the Department decided to certify the top 116 candidates for oral interviews and the evaluation of certified candidates as "best qualified." The intervenors suggest that 116 candidates, as opposed to the top 64 (25%), were certified for oral interviews to satisfy the adverse impact requirement of the consent decrees. They also suggest that 13, and only 13, candidates were rated "best qualified" in order to satisfy the immediate promotional needs of the Department while guaranteeing "that a requisite number of blacks, in this case three, would be promoted." *Id.* at 17.

Defendants ignore the fact that by certifying 116 candidates for oral interviews, no white candidates were passed over in favor of blacks scoring lower on the examination. Thus, the benefit of an oral interview and the possibility of promotion was conferred equally on similarly situated candidates of *both* races. Moreover, contrary to intervenors' suggestion, the decision to expand the class of candidates to be certified was not arbitrary. As we have seen, a large pool of candidates scored better than 95 out of 100 possible points, and numerical distinctions between the candidates ranked # 64 through # 116 were insignificant. *See supra* p. 1535. All candidates certified for oral interview thus demonstrated substantial qualification for promotion by scoring better than 95 on this phase of the promotion procedure.

The Department also cannot be faulted for employing an oral interview component in its promotion pro-

cedure when the scores of the top-ranked candidates were so closely grouped. The Department's determination that "merit" could best be measured by a combination of factors rather than by rank order use of scores on the written examination is also supported by the function performed by the oral interviews. As counsel for the Department stated in the district court: "These [oral interview] questions were designed to determine: one, how that candidate thought under stress, how he could think on his feet, communication skills, his career objectives, knowledges and goals of the duties of the Department . . ., and his overall ability to perform as a supervisor in the Department. . . ." Tr. at 16-17, No. 84-7564. Furthermore, the decision to require candidates for promotion to undergo oral interviews was particularly appropriate where the written examination had not been validated.

The intervenors' assumption that 13 "best qualified" candidates were selected to guarantee that a certain number of blacks would be promoted also is unwarranted. The intervenors introduced no evidence whatsoever in support of this charge. Indeed, the record indicates otherwise. Counsel for the Department represented to the district court that the interviewers were not "coached" or instructed on how the interviewees were to be graded. "They were not told anything. They were told to select the best candidates that appeared before them. There was no . . . they were not given any quotas or goals or any racial composition at all." *Id.* at 29-30. Additionally, since there were no limits on how many candidates could be rated "best qualified," and since the Department intends to promote only from the "best qualified" list, we fail to see how the intervenors' chances for

promotion have been materially affected by the certification of 116 candidates, rather than 64, for oral interview.

We conclude that, regardless of the wisdom of our various holdings in *Paradise I*, intervenors simply have failed to show that the Department's promotion procedure imposes promotion quotas or otherwise accords preferences or benefits to black candidates for promotion at the expense of more qualified white candidates. Rather, the record shows that the Department's promotion procedure is fair to all applicants, white and black, and that only merit factors were considered in the selection of the 13 "best qualified" candidates from the 116 certified for oral interviews. The district court therefore did not exceed its remedial authority under Title VII when it approved the Department's promotion procedure. Moreover, since the promotion procedure approved by the district court does not involve "reverse discrimination" against white candidates for promotion, the intervenors' other contention also must fail.[10]

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[10] When the district court overruled the motions to reconsider, alter or amend, and stay enforcement of the order enforcing the 1979 and 1981 Decrees, it predicted that use of the promotion quota might be a "one-time occurrence" in light of the defendants' pledge to promptly develop promotional procedures conforming with the consent decrees. R.E. at 178. The reasonableness of the order enforcing the decrees and the accuracy of the district court's prediction are attested to by recent events.

After the district court entered the July 27, 1984 order, the defendants moved the court for approval of a proposed selection procedure for promotions to sergeant. The court thereafter entered an order similar to the July 27 order, suspending the 1-for-1 promotion quota for that rank, allowing sergeant promotions from among the "best qualified" candidates for promotion to that rank, and prohibiting other ser-

The district court's orders in *Paradise I* and *Paradise II* are AFFIRMED.

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geant promotions until further order of the court. Additionally, the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks.

The recent progress made by the Department also reinforces our conclusion that the quota relief granted by the district court was necessary to commence the process of eliminating the present effects of the Department's past discrimination. It seems that the 1-for-1 promotion mandate, which has been used only once, has given the Department the incentive to comply *now* with its obligations under the law and the 1979 and 1981 Decrees. It thus appears that the principal effect of the order enforcing the decrees might be the development of acceptable promotion procedures for all ranks and the nullification of the promotion quota.

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, as Director of the Alabama Department of Public Safety, ETC., ET AL.,
DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

[Filed Dec. 15, 1983]

ORDER

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the plaintiffs' April 7, 1983, motion to enforce the terms of the February 16, 1979, partial consent decree and August 18, 1981, consent decree, be and it is hereby granted to the extent hereafter set forth;

(2) That the defendants and their agents and employees be and each is hereby enjoined and restrained from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank;

(3) That this promotion requirement shall remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the defendants have developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other legal requirements;

(4) That within 35 days from the date of this order the defendants shall submit to the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position;

(5) That the plaintiffs be and they are hereby allowed 21 days from this date to file a request for interim attorney fees, which request shall be supported by affidavits and shall address each of the criteria set forth in *Hensley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933 (1983), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); and

(6) That all other relief requested by the plaintiffs in their motion and not specifically granted be and it is hereby denied.

DONE, this the 15th day of December, 1983.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
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v.

BYRON PRESCOTT, as Director of the Alabama Department of Public Safety, ETC., ET AL.,
DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

[Filed Dec. 15, 1983]

MEMORANDUM OPINION

The present phase of the proceedings in this lawsuit began on April 7, 1983, when the plaintiffs filed a motion to enforce the terms of two previously entered consent decrees. In accordance with these decrees and as a result of recent developments, this court must determine what procedure the Alabama

Department of Public Safety must use in promoting troopers. The court understands that the department is in need of at least 15 new corporals immediately.

I.

In 1972, then Chief District Judge Frank M. Johnson, Jr., remarked in this case that "[i]n the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers." *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972). The court found that the department had "engaged in a blatant and continuous pattern and practice of discrimination in hiring . . . both as to troopers and supporting personnel;" and the court ordered that the department hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." *Id.* at 705, 706. The order was affirmed on appeal. 493 F.2d 614 (5th Cir. 1974).

In a later proceeding in this case, Judge Johnson was asked to clarify "whether the twenty-five percent hiring quota applies to the entire state trooper force or just to entry-level troopers." *Paradise v. Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala. 1979). The court responded that "there is no ambiguity" and that the twenty-five percent quota applies "to the entire force of sworn officers, not just to those in the entry-level rank." *Id.* at 440-41. The court observed that the defendants were guilty of discrimination not just in hiring, but in all ranks of the patrol. The court then emphasized that,

> One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state

> troopers at the rank of corporal or above, *there is still not one black.* The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest.

Id. at 442 (emphasis in original).

On February 16, 1979, the parties entered into a consent decree which required that the department develop and implement a valid promotion procedure for the rank of corporal. The decree gave the department a year to meet this objective, after which the department was to do the same, in turn, for the ranks of sergeant, lieutenant, captain and major. This time schedule was not met, and on August 18, 1981, the parties entered into another consent decree which allowed the department to administer a newly developed promotion procedure for the rank of corporal, but prohibited any promotions under the procedure until it had been first determined that the procedure had "little or no adverse impact against black applicants." According to the decree, adverse impact was to be determined and measured by the "four-fifths rule" set forth in Section 4 D of the Uniform Guidelines of Employee Selection Procedures, 28 C.F.R. § 50.14 (1983).

On April 7, 1983, the plaintiffs filed a motion seeking enforcement of the 1979 and 1981 consent decrees and, in particular, a determination whether the department's promotion procedure for corporal had an adverse racial impact. The department needed at least 15 new corporals, and the parties were unable to agree whether the procedure developed in 1981

could be used for the promotions. On October 28, 1983, the court found that the procedure did have an adverse racial impact on black applicants and, in accordance with the 1981 consent decree, prohibited use of the procedure.

The parties have been unable to agree upon another selection procedure for the 15 needed corporals; and, as required by the 1981 consent decree, they have requested that the court fashion a procedure.

II.

On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 *lieutenants, there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus, the Department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

In light of the severe racial imbalances in the upper ranks, the court agrees with the plaintiffs that for a

period of time at least 50% of all those promoted to corporal and above must be black troopers, as long as there are qualified black troopers available.[1] The court also agrees with the plaintiffs that if there is to be within the near future an orderly path for black troopers to enter the upper ranks, any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures for all ranks. The court will therefore enter an order requiring that, for each white trooper promoted to a higher rank, the department shall promote one black trooper to the same rank, if there is a black trooper objectively qualified for the promotion. This requirement shall remain in effect as to each rank above entry level until either 25% of the rank is black or the department has developed and implemented for the rank a promotion procedure which meets the requirements of the prior orders and decrees of this court and all other relevant legal requirements.[2] The court will also require that the department submit to

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[1] In light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances, a credible argument could be made that all 15 of the new corporals should be black, followed perhaps by a one-to-one ratio. However, the plaintiffs are not seeking this relief.

[2] According to the *1980 Census of Population* published by the U.S. Department of Commerce, the State of Alabama is approximately 26% black. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20, 97 S.Ct. 1843, 1857 n. 20 (1977), the Supreme Court stated that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position. The schedule should be based upon realistic expectations.

III.

The relief fashioned by the court today is warranted by law. Where there has been unlawful discrimination, a district court has not only the power but the responsibility to fashion a remedy that will as much as possible eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1972). As the evidence in the present case dramatically demonstrates, these effects will not wither away of their own accord. Furthermore, in fashioning relief, a court should include race-conscious requirements if they are necessary, reasonable, and otherwise appropriate under the circumstances.[3] *United States v. City of Miami*, 664 F.2d 435 (5th Cir. Dec. 3, 1981) (en banc) (former Fifth Circuit); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980).

The promotional quotas imposed by the court today are clearly necessary. The racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration; and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future.

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[3] In an earlier order this court demonstrated dramatically the efficacy of quotas, over other remedies, in instances where blacks have historically been completely excluded or almost completely excluded from employment. *NAACP v. Dothard*, 373 F. Supp. 504 (M.D.Ala. 1974) (Johnson, C.J.).

The promotional quotas are also reasonable. They are specifically tailored to redress the continuing effects of past discrimination, but they do "not unnecessarily trammel the interest of white employees." [4] *United Steelworkers v. Weber*, 443 U.S. 193, 208-09, 99 S.Ct. 2721, 2730 (1979). They do not require the discharge or demotion of a white trooper or his replacement with a black trooper; nor do they create an absolute bar to the advancement of white troopers. Moreover, the quotas are but a temporary measure, designed not to maintain a racial balance, but simply to eliminate a manifest and chronic racial imbalance. Finally, only qualified black troopers will be considered for promotion under the quotas. *See, e.g., United Steelworkers v. Weber, supra; United States v. City of Miami, supra; United States v. City of Alexandria, supra.*

The quotas imposed by the court are also not without legal precedent. In *United States v. City of Alexandria, supra*, the former Fifth Circuit approved a consent decree imposing on a municipality promotional quotas ranging from 25 to 50%. Under the decree, the quotas are to remain in effect until the municipality achieves the same percentages of blacks and women as are in the overall work force in the

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[4] The court has allowed four white troopers to intervene as defendant-intervenors. Their intervention is on a prospective basis only; they are not allowed to challenge prior orders, judgments, and decrees of the court. *United States v. California Co-operative Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424 (1929); *Smith v. Missouri Pac. R. Co.*, 615 F.2d 683 (5th Cir. 1980). *See Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, —— U.S. ——, 104 S.Ct. 255 (1983). *See also* 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 24.16[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1920.

affected localities. *See also, e.g., E.E.O.C. v. American Telephone and Telegraph Company*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 439 U.S. 915, 98 S.Ct. 3145 (1978).

Two factors in the present case make the claim for promotional quotas even stronger than it was in *City of Alexandria*. In contrast to the earlier case, here the court has made a specific finding of long-term, open and pervasive racial discrimination. Moreover, this court has before it a record demonstrating that without promotional quotas the continuing effects of this discrimination cannot be eliminated. Nevertheless, the quotas imposed by this court are substantially less constraining than those imposed in *City of Alexandria*. Under the order this court will enter today, the Alabama Department of Public Safety has the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures. It is thus possible for the use of quotas to be a one-time occurrence.

IV.

Finally, as this lawsuit moves into its twelfth year, it is clear that the court and the parties should now contemplate bringing this litigation to an end. The court therefore hopes that, in addition to achieving the above objectives, the remedy imposed today will hasten the day when the Alabama Department of Public Safety is no longer under the supervision of this court.

An appropriate order will be entered in accordance with this memorandum opinion.

DONE, this the 15th day of December, 1983.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE

v.

JERRY SHOEMAKER, as Director of the Alabama Department of Public Safety, ETC., ET AL.,
DEFENDANTS

[Filed Aug. 18, 1981]

CONSENT DECREE

On February 16, 1979, this Court entered a Partial Consent Decree in resolution of certain issues raised in Plaintiffs' Motion for Supplemental Relief. Part IV of the Partial Consent Decree provides in part as follows:

> The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion pro-

> cedure when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal . . . In accordance with that objective defendants agree to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines* [*on Employee*] *Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

Defendants have submitted to plaintiffs Paradise, et al., and the United States [hereinafter referred to collectively as plaintiffs] and to the Court a proposed selection procedure for State Trooper Corporal positions and a validity study for the written examination component of that selection procedure. Defendants have presented no validity evidence in support of the components of the proposed selection procedure other than the written examination. Plaintiffs and defendants disagree whether the proposed selection procedure is in conformity with the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed. Reg. 38290, 28 C.F.R. Sec. 50.14 (1978 [hereinafter, *Uniform Guidelines*]. Because the selection procedure has not yet been administered, the adverse impact of the selection procedure, if any, is not known.

Defendants recognize their obligation under the Partial Consent Decree to utilize a selection procedure which has little or no adverse impact on blacks seeking promotion to corporal. The parties agree that it would be in the best interest of all parties to avoid unnecessary litigation and to put a selection procedure for State Trooper Corporals in place as soon as possible. Accordingly, the parties have entered into

this Consent Decree governing the use of the proposed selection procedure for promotion of State Troopers to State Trooper Corporal positions.

NOW, THEREFORE, IT IS HEREBY ORDERED that the proposed selection procedure for State Trooper Corporal, submitted to this Court May 21, 1981, shall be administered and used as follows:

1. The proposed selection procedure shall be administered and scored as set out in defendants' letter to plaintiffs and this Court dated May 21, 1981 and in the proposed selection procedure and validation report accompanying that letter. Each of the four components of the procedure shall comprise the percentage of the total score for the selection procedure that is set out in defendants' May 21, 1981 letter.

2. Any State Trooper with permanent status for at least 24 months as of October 15, 1981 shall be permitted to take the written examination for State Trooper Corporal. It is recognized that the selection procedure provides for a score for length of service such that thirty months' service at the time the selection procedure is administered shall equal seventy points and sixty months' service (or more) shall equal one hundred points. Accordingly, one point more than seventy shall be awarded to each applicant for each month of service more than thirty months, up to a maximum of one hundred points.

3. Defendants shall compile a list of candidates for promotion for State Trooper Corporal positions based upon the composite numerical scores of applicants on the selection procedure. In determining eligibility, defendants may apply the standards for length of service set out in the proposed selection procedure. Under this Decree, defendants shall not be

required to promote any State Trooper who does not have at least 30 months' service as a State Trooper at the time of the promotion, provided that the length of service requirement is applied consistently. Defendants shall provide a copy of this list, identifying each applicant by race, to plaintiffs.

4. The list of candidates for promotion shall be reviewed to determine whether the selection procedure has an adverse impact against black applicants. Adverse impact shall be determined by reference to the *Uniform Guidelines*, by comparing the numbers (by race) of applicants with the numbers (by race) of persons passing the procedure and by comparing the numbers (by race) of applicants with the number (by race) of persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order from the list of eligible candidates. For purposes of this Decree, "applicants" shall include all persons who take the written examination for State Trooper Corporal. Adverse impact shall be determined for each of the following groups of "persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order:" (a) the first eight corporal promotions, which are expected to be awarded as soon as selections based upon the proposed selection procedure are approved by the Court; (b) all corporal promotions expected within one year of the administration of the selection procedure, based upon the good faith estimate of the Department of Public Safety; and (c) all corporal promotions expected during the life of the list of eligible candidates, based upon the good faith estimate of the Department of Public Safety as to the length of time the list will be used and the Department's anticipated staffing needs during that time. Adverse

impact shall be determined by reference to Section 4D of the *Uniform Guidelines, supra*, and the answer to question 12 of the *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996, March 2, 1979.

5. If the selection procedure has little or no adverse impact against black applicants, selections shall be made in rank order from the list described in paragraph 2 of this Decree. Whether or not the selection procedure has "little or no adverse impact" will be measured by the "four-fifths rule" set forth in Section 4 D of the *Uniform Guidelines, supra.* If the parties cannot agree whether the selection procedure has an adverse impact, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made pending resolution of the question of adverse impact.

6. If the parties agree, or the Court finds, that the selection procedure has an adverse impact, promotions shall be made in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure. Defendants shall submit to plaintiffs their proposal for making promotions in conformity with the Partial Consent Decree and with this Decree. If the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made until the parties have agreed in writing or the Court has ruled upon the method to be used for making promotions with little or no adverse impact.

7. If the selection procedure has an adverse impact against blacks seeking promotion to corporal, de-

fendants shall examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and shall revise the procedure so as to avoid adverse impact in the future. Defendants shall provide plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test. The parties shall attempt to agree upon modifications in the selection procedure for future administrations. If the parties are unable to agree upon the procedure to be used after the first administration of the selection procedure and the method of using that procedure, the matter shall be submitted to the Court for resolution.

ORDERED this 18th day of August, 1981.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

APPENDIX E

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE
CLIFTON BROWN, PLAINTIFF-INTERVENOR

—*v*—

M. L. HILYER, as Director of the Alabama Department of Public Safety, ETC,; ET AL.,
DEFENDANTS

PROPOSED PARTIAL CONSENT DECREE

Come the parties, plaintiff Phillip Paradise, Jr., individually and on behalf of the class similarly situated, plaintiff and *amicus curiae* the United States of America (hereinafter referred to collectively as "plaintiffs") and defendants, M. L. Hilyer, as Director of the Alabama Department of Public Safety, his agents, assigns, etc., and Stanley Frazer, as Director of the Alabama Department of Personnel, his agents, assigns, etc., and enter into a consent agreement as to Plaintiffs' Motion for Supplemental Relief as follows:

I. STATEMENT OF PURPOSE

Defendants recognize the continuing effect of the orders issued by this Court on February 10, 1972 and August 5, 1975. Defendants will have as an objective within the Department of Public Safety an employment and promotion system that is racially neutral. In this respect, defendants and their officers, agents and employees, successors and all persons acting in concert with them or any of them, in the performance of their official functions, agree not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks. In addition, defendants agree not to engage in any act or practice which discriminates on the basis of race in hiring, promoting, upgrading, training, assignment, discharge or otherwise discriminate against any employee of, or any applicant, or potential applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race. Defendants agree that any time after entry of this partial consent decree the plaintiffs may apply to this Court for an order which would enforce the terms of the partial consent decree or apply for any other relief which may be appropriate.

II. NEW DISCIPLINARY REVIEW PROCEDURES

Defendants will distribute the attached Notice of Disciplinary Review Procedures to all Department employees of the trooper rank. In this way, all troopers will be apprised of the availability of procedures for them to obtain a review of certain disciplinaries contained within their files, including oral and

written counseling, oral reprimands, written reprimands, suspensions, transfers and pay raise denials, which said troopers contend were the result of racial discrimination. These procedures are fully described in the attached Notice of Disciplinary Review Procedures and are fully incorporated herein and agreed to by the parties.

This notice will be distributed to all employees of the trooper rank no later than thirty (30) days from the date of this decree. Plaintiffs and defendants will submit names of the persons they have selected for the Disciplinary Review Board within thirty (30) days of the date of this decree, and they request the Court to select the third Board member at its earliest convenience. Board members who are not members of the Department of Public Safety will be compensated at a reasonable rate by the Department for Board service.

III. RACE RELATIONS PROGRAM

In order to further their objective of a racially neutral employment and promotion system, defendants will establish a comprehensive Equal Employment Opportunity (EEO) Program. This program will be designed to provide a vehicle for airing grievances concerning allegations of racially disparate treatment and to further and promote race relations within the Department. Defendants agree to appoint an employee of the Department of Public Safety as the Department-wide EEO officer. This officer will have responsibility for supervising the Equal Employment Opportunity Program within the Department and monitoring Departmental compliance with this and other court decrees. This officer will also conduct a class or series of classes concern-

ing race relations for each state trooper academy class and for each supervisory in-service training program held by the Department. This officer will also be responsible for instituting an EEO grievance procedure, which will provide all troopers with access to specially trained EEO officers when such troopers have complaints of a racial nature. This grievance procedure will be implemented as an addition to present grievance procedures. The Department-wide EEO officers will make recommendations to the Director concerning resolutions of these racial grievances.

Defendants also agree to appoint an EEO officer for each state trooper district in the State and to provide him with special training in the field of race relations. These district EEO officers will process racial grievances and forward them to the Department-wide EEO officer for resolution, and will promote and further race relations within each individual district.

Defendants will, within 60 days, publish a comprehensive description of the EEO program and distribute it to all state trooper personnel, along with a letter from the Director encouraging all personnel to utilize the program.

IV. PROMOTIONS

A. The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal (hereinafter referred to as the "objective" or "above-stated objective.") In accordance with that objective defendants agree to utilize a pro-

motion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

B. In accordance with the above-stated objective defendants agree to develop for the position of corporal a promotion procedure which (1) would be developed by defendants no later than one year from the signing of this Consent Decree, (2) would be submitted upon completion of the formulation of the promotion procedure to counsel for plaintiffs who would have at least 60 days to review the promotion procedure and would be able to request from defendants any information relevant to the proposed promotion procedure, and (3) would be submitted upon completion of plaintiffs' review to this court for approval on the basis of the above-stated objective.

In the interim, defendants agree to utilize the state merit system for all promotions to corporal, during which time defendants will promote at least three black troopers to the rank of corporal.

Upon completion of validation of a new procedure for promotion to corporal, defendants, in accordance with the above-stated objective, agree to begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of lieutenant, captain and major.

V. TERMINATIONS

Defendants agree to review all terminations of state troopers made from August 5, 1975 through March 1, 1979. If the Department finds that any termination resulted in whole or in part from racial

discrimination, each such person shall be offered re-employment at the level at which he was terminated, unless such termination occurred prior to graduation from the trooper Academy, in which case such person shall be required to complete the entire Academy training course.

A report of this review will be presented to counsel for plaintiffs as soon as practicable, but not later than April 15, 1979. All reinstatements will be made by April 15, 1979, with the exception of any individual terminated during his Academy training, who shall be reinstated at the next Academy training session. Plaintiffs except from this portion of the decree with respect to class member Charles Gregory Potts. Plaintiffs contend that Mr. Potts should be reinstated irrespective of the review conducted by defendants.

VI. ATTORNEY FEES AND COSTS

The defendants hereby agree to pay all court costs and related expenses incurred by plaintiffs, as well as reasonable attorneys fees to counsel for the plaintiffs.

TO: All Department Employees Holding the Rank of State Trooper

FROM: M. L. Hilyer, Director

NOTICE OF DISCIPLINARY REVIEW PROCEDURES

Judge Frank M. Johnson, Jr. has approved of a new procedure whereby the Department of Public Safety will review certain disciplinary actions taken by the Department against its employees holding the rank of state trooper, which disciplines were given between August 5, 1975 and March 1, 1979.

All troopers are hereby given permission to review their 201 files. Any trooper who, after reviewing his file, feels that any discipline given him during this period, including oral and written counselings, oral and written reprimands, suspensions, transfers and pay denials, was given him as a result of racial discrimination, shall give notice thereof to the Department in writing. This written notice *shall* specify the dates and nature of the disciplinary which the trooper contends was racially motivated, as well as the name(s) of the Department personnel whose conduct the trooper contends was racially motivated.

Each claim so presented will then be assigned a date, at which time each trooper will be given an opportunity to present his contentions to an impartial review board. This board will consist of three persons, as follows: one private citizen chosen by Judge Frank M. Johnson, Jr.; one person chosen by the attorneys representing the plaintiff class; and one person chosen by the Department of Public Safety. Troopers presenting such claims may, on their own,

obtain an attorney, who will be given an opportunity to participate in the hearing. The Department may respond to such claims through an attorney of its choice.

Attorneys for both sides will be afforded an opportunity to present opening statements, to examine and cross-examine witnesses, to introduce documentary evidence and to give closing arguments. Although the hearing will be conducted in a trial-like manner, formal rules of evidence will not be followed.

If after hearing both sides, a majority of the Board finds the claim to be established by a preponderance of the evidence, any and all records relating to such disciplinaries shall be removed from all three of said trooper's personnel files and given to the trooper. No copies shall be retained by the Department. If the Board finds that a trooper has not established his claim, no action will be taken. Neither side has a right to appeal from the determination of the Board.

All written requests for review in accordance with this notice must be submitted within sixty (60) days of the date of this notice. The Department gives its assurance that no adverse action will be taken against troopers who utilize these procedures.

M. L. HILYER

Date

ORDER

Upon consideration of the foregoing proposed partial consent decree executed and presented by all parties in this case, and with the specific understanding by this Court that the orders made and entered herein on February 10, 1972, and August 5, 1975, continue in full force and effect, it is the ORDER, JUDGMENT and DECREE of this Court that said partial consent decree be and is hereby approved and the parties are hereby ORDERED to implement same in accordance therewith and in accordance with the orders of this Court of February 10, 1972, and August 5, 1975.

Done, this the 16th day of February, 1979.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 84-7053 and 84-7564

D.C. Docket No. 72-3561

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF AMICUS CURIAE-APPELLEE, CROSS-APPELLANT

versus

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL., DEFENDANT-APPELLANT, CROSS-APPELLEE

V. E. MCCLELLAN, ET AL., DEFENDANTS-INTERVENORS, APPELLANTS, CROSS-APPELLEES

Appeals from the United States District Court for the Middle District of Alabama

---

Before FAY and ANDERSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

---

* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the District Court appealed from, in these causes be and the same are hereby, AFFIRMED;

It is further ordered that defendant-appellant/cross-appellee and defendants-intervenors, appellants/cross-appellees pay to plaintiffs-appellees and plaintiff, amicus curiae appellee/cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 12, 1985

For the Court: SPENCER D. MERCER, Clerk

Issued as Mandate: Sept. 4, 1985

By: /s/ Jarren A. Godfrey
Deputy Clerk

APPENDIX G

LAW OFFICES OF

EDWARD L. HARDIN, JR., P.C.
A Professional Corporation
Attorneys at Law
1825 Morris Avenue
Birmingham, AL 35203
(203) 320-2679

May 21, 1981

Hon. John Carroll
Southern Poverty Law Center
1001 S. Hull Street
Montgomery, Alabama 36101

Re: *Paradise* v. *Shoemaker*
U.S. District Court of Alabama
Case No. 3561-N

Dear John:

As per the Court's order of May 16, I am enclosing to you one copy of each of the following:

1. Proposed Examination of State Trooper Corporal;
2. Alabama Merit System Report of Validation Study State Trooper Corporal;
3. Alabama Department of Public Safety Service Rating Form;
4. Procedure for Evaluating Length of Service State Trooper Corporal;
5. Supervisory Promotional Evaluation State Trooper Corporal Form;

6. Definitions of Evaluation Factors State Trooper Corporal;
7. Promotional Examination Rating Form (Defines terms used in form described in #5 above);
8. Information and Guides Supervisory Evaluation State Trooper Corporal.

Our proposed promotional procedure accords the following weights to the above factors:

1.	Written test	60%
2.	Length of Service	10%
3.	Supervisory Evaluation	20%
4.	Service Ratings	10%

The Service Ratings score to be used in the above procedure would be the average of the candidate's three most recent service ratings.

It is my understanding that we have agreed that our production of this material relieves the Defendant of the obligation to answer the Interrogatories and Request for Production filed by the Southern Poverty Law Center on April 16, and that, should you have any questions after your examination of the material we are producing today, you will pursue the answers to those questions thru depositions or additional interrogatories. Please inform me immediately if I have misunderstood our agreement on this matter.

Regarding any questions you might have, if you will convey them to me informally first via telephone or letter, it may be that I can get them answered for you without the necessity of formal discovery proceedings, thereby expediting this whole matter.

If I can be of further assistance, please feel free to call me.

Yours truly,

/s/ Buddy
LEON (BUDDY) KELLY, JR.

LKjr/jws
Encl.

cc: Honorable Myron Thompson
U.S. District Judge

Mr. Tommy Flowers
State of Alabama Personnel Department

★ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20042

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL., RESPONDENTS.

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DENNIS N. BALSKE
DEBORAH A. ELLIS
400 Washington Avenue
Montgomery, AL 36102
205/264-0286

ATTORNEYS FOR
RESPONDENTS

BEST AVAILABLE COPY

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Montgomery, AL 36102
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ATTORNEYS FOR
RESPONDENTS

QUESTION PRESENTED

Whether a district court may enforce a consent decree by awarding race-conscious numerical relief when the employer has voluntarily consented to the decree, the district court has found an historical pattern of intentional racial discrimination, and the relief does not abrogate any seniority rights.

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TABLE OF AUTHORITIES

Cases:	Pages:
EEOC v. Local 638, ... Local 28 of Sheet Metal Workers, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub. nom. Local 28 of Sheet Metal Workers v. EEOC, 54 U.S.L.W. 3223 (Oct. 7, 1985) No. 1656	20, 21, 22, 24
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Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted sub. nom., Local 93 Int'l Assn. of Firefighters v. City of Cleveland, 54 U.S.L.W. 3223 (Oct. 7, 1985) No. 84-199	20, 21, 22, 24
Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3692 (March 26, 1985) No. 84-1340	21

Constitution and statutes:

U. S. Const. Amend XIV (Equal Protection Clause) 2, 19

Civil Rights Act of 1964, Tit. VII, § 706(g), 42 U.S.C. 2000e5(g) 1, 18

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Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290-38309 (1978) 12

No. 85-999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL., RESPONDENTS.

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents, Phillip Paradise, Jr., et al., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, in order that such judgment may be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 706(g) of the Civil Rights Act of 1964, as amended by the Equal Employment

Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g), states in pertinent part:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Preliminary Statement

The United States, contesting before this Court the lawfulness of an order containing numerical race-conscious relief, fails to acknowledge that the federal government supported the granting of identical relief when this case was brought almost fourteen years ago. While the position of the United States has changed during the intervening years, the need for the numerical race-conscious relief has not diminished. The Alabama Department of Public Safety's flagrant and egregious discrimination against black employees persists today, fourteen years after such conduct was first condemned.

When this lawsuit was brought in 1972, not one black trooper had been hired in the thirty-seven-year history of the Alabama Department of Public Safety, giving that agency the dubious

distinction of being the most exclusionary in Alabama state government. NAACP v. Dothard, 373 F. Supp. 504, 506 (M.D. Ala. 1974). Then Chief District Judge Frank M. Johnson, Jr., ordered that the Department hire one black trooper for each white trooper hired until approximately twenty-five percent of the force was black. More than a decade later, when the district court entered the order at issue here, the court summarized the continuing effects of the Department's unlawful conduct:

> [T]he effects of these [racially discriminatory] policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, there is still not one black. Of the 25 captains, there is still not one black. Of the 35 lieutenants, there is still not one black. Of the 65 sergeants, there is still not one black. And of the 66 corporals, only four are black. Thus, the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons.

A-60.[1] (Emphasis in original.)

The United States asks for review but requests that the petition be held pending the disposition of three other pending cases. The victims in this employment discrimination lawsuit, who have won every issue below, nonetheless join with the United States in asking that this Court hear their case. However, the victims request immediate review. The victims believe the facts here so powerfully illustrate both the reality of the discrimination Title VII was designed to eliminate, and the appropriateness of the type of relief ordered, that this Court should consider this case not after but in conjunction with the pending cases involving similar issues.

B. Litigation History Prior to the Enforcement Proceedings

---

[1] References to the Petition for Writ of Certiorari are cited as "Pet.___." References to the Appendix to the Petition are cited as "A-___."

The NAACP brought this case in January 1972, alleging that the Alabama Department of Public Safety ["the Department"][2] had engaged in intentional racial discrimination in refusing to hire any black troopers in its 37-year history. Soon after, the United States became a party plaintiff[3] and Phillip Paradise, Jr., ["Paradise"] intervened individually and on behalf of a similarly situated class.

After a hearing, Judge Frank M. Johnson, Jr., found that the Department had "engaged in a blatant and continuous pattern and practice" of discriminating against blacks in hiring, with respect both to state trooper positions

---

[2] Throughout this litigation, the Personnel Department of the State of Alabama has also been a named defendant. The Personnel Department is responsible for developing and implementing the tests that are used to hire and promote troopers. However, the Personnel Department has never taken an active role in the litigation of the case.

[3] Although still denominated a plaintiff in recent proceedings before the district court, since 1983 the United States has vigorously opposed new numerical race-conscious relief.

and supporting personnel jobs.[4] NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974). He enjoined the Department from engaging in any employment practices, including promotion, which had the purpose or effect of discriminating on the ground of race or color. Specifically, the court ordered the Department to hire one black trooper for each white trooper hired until approximately twenty-five percent of the force was black ("1972 order").

The Department appealed to the former Fifth Circuit, alleging that the quota relief unconstitutionally discriminated against white applicants. In its appeal, the Department did not question the court's finding of blatant and continuous discrimination. 493 F.2d at 617. The Fifth Circuit affirmed the district court's order in its entirety.

---

[4] With regard to supporting personnel, Judge Johnson awarded relief under the related case of United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970). The Alabama Department of Personnel is still under the court's jurisdiction in that case.

In 1974 Paradise moved for further relief on the grounds that the Department had artificially restricted the size of the trooper force in order to circumvent the 1972 order and that a disproportionate number of the blacks hired under that order had failed to achieve permanent trooper status. After a hearing was held, the court, in an unreported decision, found that the Department had indeed defied the 1972 order by "artificially restrict[ing] the size of the trooper force and the number of new troopers hired" ("1975 order"). See A-8. The evidence revealed that since the 1972 order, the Department had hired fewer troopers than it would have ordinarily hired to offset attrition, even though state officials had recognized that there was a critical shortage of troopers. The court also found that the higher attrition rate among black troopers resulted from a failure to select the best qualified blacks from the eligibility rosters; social and official discrimination against blacks at the trooper training academy;

preferential treatment of whites in some aspects of training and testing; and harsher discipline of blacks than whites for similar misconduct. As a result of these findings, the court enjoined the defendants from "delaying or frustrating the achievement of the 1972 order by artificially restricting the size of the trooper force." Id.

In September 1977, Paradise moved for supplemental relief. After each side engaged in extensive discovery, a consent decree was agreed to by all the parties and approved by the court on February 16, 1979 ("1979 decree"). A-74-82. The Department agreed that its goal was to have a racially neutral employment and promotion system and that it would not engage in any employment practice that discriminated against blacks. Specifically, the 1979 decree obligated the Department to develop within one year a procedure for promotion from trooper to corporal that would have little or no adverse impact upon blacks. The Department also agreed to begin validation of promotional procedures

for the remaining ranks in the trooper force: sergeant, lieutenant, captain, and major. In addition, the parties explicitly recognized the continuing validity of the 1972 and 1975 orders and the Department agreed that the plaintiffs could apply for an order enforcing the decree "or for any other relief which may be appropriate." A-75.

Interim procedures to be used prior to validation of the corporal promotion test were set forth in the consent decree and in a separate agreement between the parties. Pursuant to those procedures, four blacks and six whites were promoted to corporal in February 1980. As it would turn out, those four were the only black troopers promoted until after the court's December 1983 order.

Only five days after the court approved the 1979 decree, the Department filed a motion requesting that the court redefine the 25 percent quota, on the ground that "state trooper" in the 1972 order referred only to entry-level positions. Paradise v. Shoemaker,

470 F. Supp. 439 (M.D. Ala. 1979). Questioning whether such an argument "possesses the slightest patina of plausibility," 470 F. Supp. at 440-41 n.1, the court firmly rejected it and reminded the Department that under the terms of the 1972 order, the hiring goal was to remain in effect until "approximately 25% of the state trooper force is black." 470 F. Supp. at 440 (emphasis in original). The court also reiterated that defendants had been found guilty not just of excluding blacks from entry-level positions, but of operating an all-white organization. Thus, the 1972 order was "but the necessary remedy for an intolerable wrong." 470 F. Supp. at 442.

It was more than two years after agreeing to the 1979 decree, and more than a year after the date by which it had promised to produce a plan, that the Department moved on April 13, 1981, for approval of a new procedure to be used for promotions to corporal. Paradise and the United States objected to the Department's proposed procedure on the grounds that it had

not been validated in accordance with the Uniform Guidelines on Employee Selection Procedure, 43 Fed. Reg. 38290-38309, and that it would not be acceptable if it had an adverse impact on black applicants. Discovery was conducted, and then before a hearing could be held, the parties entered into a consent decree on August 18, 1981 ("1981 decree). A-65-73.

In the 1981 decree, the parties agreed that in order to establish quickly a procedure for promotion to corporal, the Department could use its proposed procedure but that the promotions based upon it would be barred if it was determined that the procedure had an adverse impact on blacks. The existence of adverse impact was to be determined under the Uniform Guidelines. If the parties could not agree among themselves whether the procedure had adverse impact, the dispute would be submitted to the court. In the 1981 decree the parties also reiterated that "it would be in the best interest of all parties to avoid unnecessary litigation and to put a selection

procedure for State Trooper Corporals in place as soon as possible." A-66.

In accordance with the 1981 decree, a written examination was administered, and in June 1982 the Department announced that it intended to make promotions from the resulting register. However, the United States objected to use of the register, because the unvalidated procedure had an adverse impact on blacks, and suggested that, pursuant to the 1981 decree, the Department formulate a proposal for making promotions in a nondiscriminatory manner as required by the 1979 and 1981 decrees. The Department did not submit any further proposal, or make any promotions, during the next nine months.

C. The Enforcement Proceedings

On April 7, 1983, Paradise moved to enforce the terms of the 1979 and 1981 decrees because the promotion procedure to be used by the defendants pursuant to the 1981 decree would have an adverse impact on black applicants. Paradise moved for a one-for-one

promotion order, reminiscent of the original hiring order, that would remain in effect only until the defendants developed and began to use a valid promotion procedure. Shortly after the motion to enforce was filed, on April 15, 1983, V. E. McClellan and three other white troopers ("McClellan") moved to intervene on behalf of a class composed of top-ranking white applicants for promotion to corporal. On October 28, 1983, the court granted intervention on a prospective basis only. Paradise v. Prescott, 580 F. Supp. 171 (M.D. Ala. 1983); see A-63 n.4. On the same day, the court found that the defendants' proposed selection procedure had an adverse impact on black candidates. After reviewing the results of the 1981 procedure, the court reflected: "Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact." 580 F. Supp. at 173. Following the provisions of the 1981 decree, the court prohibited the use of the existing promotion procedure, ordered the

Department to submit a proposed promotion plan, and stated that if the parties could not agree on a plan, the matter would be deemed submitted to the court for resolution.

On December 15, 1983, the district court issued its order and memorandum opinion requiring a temporary plan of one-for-one promotion to the rank of corporal in order to meet the Department's immediate need to promote 15 new corporals. A-55-64. The court specified that the temporary promotion order would remain in effect for each rank only until either 25% of the rank was black or until the Department developed and used a promotion procedure that did not adversely affect black candidates.[5] The court explicitly based its order on the provisions of the 1981 decree,

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[5] The court also opined that in light of the Department's longstanding failure to eradicate the continuing effects of its pervasive discrimination and to develop acceptable promotion procedures as well as in light of the severity of the existing racial imbalances, perhaps all 15 of the present corporal promotions should have been awarded to blacks. A-61.

noting that the 1981 decree required the court to fashion a procedure if the parties were unable to agree upon one.

In its opinion, the district court condemned the Department's failure to eliminate the racially discriminatory policies and practices that had been held unlawful twelve years before, and the court summarized the pervasive and manifest effects of that discrimination. The court found that the four blacks promoted to corporal under the terms of tne 1981 agreement were the only blacks in the upper ranks of the Department and that the Department was still without acceptable promotion procedures for any of its ranks. Noting that this history of obdurate conduct dramatized the fact that the effects of discrimination "will not wither away of their own accord," A-62, the court detailed why numerical relief was necessary. Absent "immediate, affirmative, race-conscious action," the court said it believed that the "egregious" and "intolerable" racial

disparities would not "dissipate within the near future." Id.

On February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to the district court's order. So far, it has not been necessary to invoke the promotion order another time, for the Department has finally, after years of delay, developed promotion procedures for corporals and sergeants which have been conditionally approved by the court.

The Department, the United States, and McClellan meanwhile appealed to the Eleventh Circuit Court of Appeals from the district court's enforcement order.[6] The Eleventh Circuit affirmed the district court's order in all respects.

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[6] The intervenors also appealed from a later order in which the court conditionally approved a new selection procedure for promotion to corporal. That order, denominated "Paradise II" by the Eleventh Circuit, was also affirmed. A-45-54. Neither respondents nor petitioners seek review of that order.

The Eleventh Circuit gave short shrift to the appellants' contention that the district court's enforcement order constituted a modification of the 1979 and 1981 Decrees. Pointing out the "district court's fidelity to the detailed procedural mechanism established in the 1979 and 1981 Decrees," A-23-24, the court held that the district court's promotion order is a proper exercise of its enforcement responsibilities under the decrees, as those decrees are concerned with the impact of proposed promotion procedures "on blacks, and blacks alone," and expressly authorize plaintiffs to apply for an order enforcing their terms or for any other relief. A-22-27.

The court of appeals likewise rejected appellants' assertion that the enforcement order exceeds the district court's remedial authority under Section 706(g) of Title VII. A-28-35. Although appellants had argued that Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), prohibits all affirmative equitable relief that benefits

persons not found to have been actual victims of discrimination, the court concluded that Stotts is "limited to its own facts." A-31. Specifically, it set forth four reasons why Stotts does not apply to this case: 1) the order here does not override a bona fide seniority system; 2) the case is replete with findings of pervasive intentional discrimination against blacks, which the consent decrees were designed to overcome; 3) Stotts was a Title VII case, while this case was brought under the Fourteenth Amendment; 4) the district court here was simply enforcing a consent decree while Stotts concerned the power of a court to modify a consent decree.

The court of appeals also rejected appellants' claim that the order violates the Fourteenth Amendment. Citing the "long history of discrimination [that] cannot be denied", A-39, the court held that the affirmative order is justified because it is designed to remedy the present effects of past discrimination. The court discussed several different standards

for judging the constitutionality of affirmative action, and concluded that the order is constitutional under any of the approaches. A-35-42. Finally, the court found that the relief is warranted under the dictates of United Steelworkers of America v. Weber, 443 U.S. 193 (1979), because it does not require the discharge, demotion, or replacement of any white troopers; is temporary; does not permit the promotion of any unqualified black troopers; and is specifically tailored to redress a manifest and chronic imbalance caused by the Department's conduct. A-42-45.

REASONS FOR GRANTING THE WRIT

The issue presented in this case is substantially similar to the questions already before this Court in Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted sub. nom., Local 93, Int'l Assn. of Firefighters v. City of Cleveland, 54 U.S.L.W. 3223 (Oct. 7, 1985), and EEOC v. Local 638, ... Local 28 of Sheet Metal Workers, 753

F.2d 1172 (2d Cir. 1985), cert. granted sub. nom, Local 28 v. EEOC, 54 U.S.L.W. 3223 (October 7, 1985). These cases have been consolidated. While Local 93 and Local 28 also involve race-conscious relief, this case presents the issue in a context which is not yet before this Court: the enforcement of a consent decree in a case where there has been findings of intentional discrimination. Therefore, this Court should consolidate this case and consider it with Local 93 and Local 28.[7]

Like this case, Local 93 involves quota relief contained in a consent decree, but in Local 93 there have never been any findings of

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[7] Petitioners argue that this case should be held pending disposition of Local 93, and Local 28, as well as Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3692 (March 26, 1985). However, because the question of quota relief is presented in a different context in this case, even the United States acknowledges that the decisions in those cases may provide only "substantial clarification" of the issue here. To achieve a full resolution of the issue in the first instance, this case should be considered with Local 93 and Local 28.

intentional discrimination.[8] At issue in Local 28 is a contempt citation. This case involves the enforcement[9] of a consent decree voluntarily entered into by the parties, in light of a history of profound and pervasive discrimination. As such, it is typical of many consent judgments that have been agreed to in Title VII cases in order to eradicate legacies of discrimination.

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[8] Also, the consent decree in Local 93 was entered over the opposition of the union, an intervenor of right. Here there was no opposition to either the 1979 or 1981 decrees.

[9] There is no merit to petitioner's argument that the order "modified" the consent decrees. Apparently because the Eleventh Circuit decisively rejected previous arguments that the order constituted a "modification," (see page 18, supra), petitioners now suggest that the order was a modification because the one-for-one order "was greatly different, in kind and degree," from the relief contemplated by the consent decrees that "specific numbers of blacks would be promoted." Pet. 10. It is self-evident, however, that a one-for-one order is of the same ilk as an order requiring specific numbers of blacks to be promoted. Also, a one-for-one order is clearly encompassed within the "other relief" authorized by the consent decrees, especially in light of the fact that an identical order on hiring has been in effect for many years.

Only numerical race-conscious relief could remedy the discrimination here. Like the identical initial hiring order that the United States has always supported, the one-for-one promotion order was made necessary by the long history and current practices of an all-white organization excluding blacks from its upper ranks. The promotion order is additionally justified by the Department's repeated refusal to meet its obligations under its voluntary agreements embodied in the 1979 and 1981 decrees.

Although the facts of this case are egregious, we submit that they are an illustrative example of many situations in which consent decrees have been entered into against long histories of discrimination. Accordingly, full briefing and argument of this case will reveal most clearly to this Court why numerical race-conscious relief is permissible--is indeed sometimes necessary--to end employment discrimination in such all too common cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and this case should be considered with Local 93 and Local 28.

Respectfully submitted.

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January 8, 1986

Supreme Court, U.S.
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CLERK

No. 85-999 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 10, 1985
CERTIORARI GRANTED JULY 7, 1986

1838

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RELEVANT DOCKET ENTRIES

Date	NR	Proceedings
1972		
Jan. 3		Complaint filed. Injunctive relief requested.
Jan. 12		ORDER designating the United States to appear and participate in all proceedings in this action as a party and amicus curiae. (Copies mailed to Gordon Madison, defts. Stanley Frazer and Walter L. Allen; copies handed to U.S. Attorney and Morris Dees; copy also mailed to David Norman.)
Jan. 13		Temporary Restraining ORDER. Defendants temporarily enjoined and restrained from recruiting, hiring, or making any commitment to hire any additional Alabama State troopers until this Court can conduct a hearing on plaintiff's motion for a preliminary injunction and until this Court can determine the issued involved. (Copies mailed to counsel; copy handed to U.S. Attorney's secretary; copies delivered to Marshal for service on defts.)
Feb. 2		Defendants' answer to complaint.
Feb. 10		ORDER/(1) denying defendants' motion to dismiss; (2) enjoining defendants John S. Frazer, as Director, Ala. Personnel Dept. and Walter L. Allen, as Director, Ala. Department of Public Safety, their agents, officers, etc. from engaging in any employment practices, including recruitment, ex-

Date	NR	Proceedings
		amination, appointment, training, promotion, retention or any other personnel action for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment on the ground of race or color; (3) enjoining defendants from failing to hire and permanently employ after the probationary period 1 Negro trooper for each white trooper hired until approximately 25 percent of the Ala. state trooper force is comprised of Negroes; (4) enjoining defendants from conducting any training courses for the purpose of training new troopers until the groups to be given said training courses are comprised of approximately 25 percent black trooper candidates; (5) enjoining defendants from failing to hire supporting personnel for the Dept. of Public Safety in the ratio of 1 Negro for each white until approximately 25 percent of the supporting personnel are black; (6) abrogating eligible and promotional registers heretofore used for the purpose of hiring troopers to the extent necessary to comply with this decree; (7) requiring defendants to assign employees on the basis of their training and ability, without regard to race. Defts. shall advise the public in all advertisements and announcements that they will appoint and employ per-

Date	NR	Proceedings
		sons on an equal opportunity, merit basis, without discrimination on the ground of race or color. Defts. shall adopt and implement a program of recruitment and advertising which will fully advise the Negro citizens of the State of Ala. of the employment opportunities now available to them with the Ala. Dept. of Public Safety. No commitments of employment given by either of the defts. or any of their agents to any applicant or potential applicant, short of actual hiring prior to 1/13/72, the date the temporary restraining order was entered in this case, shall be given any priority over the hiring ratio set out in decree. Defendants to file within 90 days from this date a written report setting forth in detail the efforts which have been undertaken to recruit and hire black applicants. Costs taxed against defendants in this case. *Jurisdiction retained.* AMENDMENT FILED 8/5/75 and 2/16/79.
Mar. 7		Defendants' notice of appeal to the U.S. Court of Appeals, Fifth Circuit from the order entered in this Court 2/10/72. (Copies of notice mailed to Morris Dees and Joseph J. Levin, Jr.; U.S. Attorney; Edward W. Wadsworth, Clerk, U.S. Court of Appeals; David L. Norman.)

Date	NR	Proceedings
1973		
Jan. 5		ORDER that record in this case be supplemented to include all evidence received in case of U.S. v. Frazer, Civil Action No. 2709-N interrogatories and answers, depositions and stipulations of the parties filed in this case since Nov. 12, 1973, and a copy of this order. Attorneys for U.S. ordered to file with Clerk of CCA within 7 days all evidence received by this Court in Civil Action No. 2709–N; Clerk ordered to forward forthwith to Clerk of CCA, the other supplemental materials. (Copies mailed to counsel.)
1974		
Apr. 22		Plaintiffs' motion for further relief. (Referred to Judge Johnson)
May 15		JUDGMENT of U.S. Court of Appeals (issued as mandate 5/13/74). Judgment of Judgment of district court affirmed; defendant-appellant to pay plaintiff, intervenor-appellee, and plaintiff and amicus curiae-appellee costs on appeal. Certified copy of opinion attached.
1975		
Aug. 5	41	ORDER denying plaintiffs' motion for further relief insofar as the motion seeks modification of the terms of the Court's order of 2/10/72; further ordered (1) denying Governor George C. Wallace's motion to be dismissed as a party defendant; (2) enjoining defendants George C. Wallace, John

Date	NR	Proceedings
		S. Frazer, E. C. Dothard, their agents, officers, successors in office, employees and all persons acting in concert or participation with them from taking any action or failing to take any action, which action or inaction results in the artificial restriction of the size of the Alabama state trooper force; (3) continuing the motion for further relief filed 4/22/74, insofar as it seeks an adjudication of the validity of the employment criteria and tests of the Alabama Department of Public Safety until further order of the Court; (4) denying defendants' motion for "Modification and/or Reconsideration of Certain Findings in the Court's Order of January 5, 1974" and (5) directing defendants to file with this Court on or before 1/20/76, a comprehensive report reflecting as of 1/1/76, the number of troopers by race, the number of support personnel by race, the number of troopers and support personnel hired since this order and the number of troopers hired since this order that have achieved permanent status. (Copies mailed to counsel.) AMENDMENT FILED 2/16/79.
1977		
Sept. 23		Plaintiffs' motion for supplemental relief. Referred to Judge Johnson. Exhibit attached. SEE ORDER OF 2/16/79.

Date	NR	Proceedings
1979		
Feb. 16		Agreement of counsel for the parties relating to promotions to the rank of corporal. Referred to Judge Johnson.
Feb. 16	50 57	Parties' proposed partial consent decree (referred to Judge Johnson) and ORDER approving said partial consent decree; directing that said decree be implemented in accordance therewith and in accordance with the orders of the Court of 2/10/72 and 8/5/75. (Copies furnished to counsel.)
	58	SEE AMENDMENT FILED 2/16/79.
Feb. 21		Defendants' motion to more fully define quota relief or, in the alternative, motion for supplemental relief. Referred to Judge Johnson. Hearing requested. SEE ORDER OF 2/22/79. SEE ORDER 4/13/79.
Apr. 13	61	MEMORANDUM. (Copies furnished to counsel.)
Apr. 13	65	ORDER denying defendants' motion to define quota relief or, in the alternative, for supplemental relief filed 2/21/79. (Copies furnished to counsel.)
1981		
Apr. 13	66	Defendants' motion for approval to utilize the Corporal's Promotional Examination along with a Report of a Validation Study prepared by the State of Alabama, Personnel Department and for a hearing on same. Referred to Judge Thompson.

Date	NR	Proceedings
1981		
July 20	83	Memorandum brief of plaintiffs and U.S. to the proposed examination for State Trooper Corporal. Referred to Judge Thompson.
Aug. 18	101	Consent DECREE and ORDER that the proposed selection procedure for State Trooper Corporal, shall be administered and used as set out in this order. Exhibit attached. (Copies furnished to counsel.)
1983		
Apr. 7	108	Plaintiffs' motion to enforce the terms of the 2/16/79 partial consent decree the 8/18/81 consent decree. Exhibits attached. Referred to Judge Thompson.
Apr. 13	129	ORDER that the other parties file written responses to the plaintiffs' 4/????? motion to enforce the terms of the 2/16/79, partial consent decree and 8/18/81, consent decree. If any of the parties desires to engage in dis??? to present evidence, or for the court to set a briefing schedule on the motion, the party must request the same in writing by 4/29/83; otherwise motion and any responses thereto shall be deemed under submission as of 4/29/83. (Copies mailed to counsel; copy furnished to U.S. Attorney.)
Apr. 15	130	Motion of V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport; intervene. Exhibits attached. Referred to Judge Thompson.

Date	NR	Proceedings
Apr. 18	145	Amendment to motion to intervene of V. E. McClellan, William M. Bailey, D. Mansell and Dan Davenport. Referred to Judge Thompson.
Apr. 18	147	ORDER setting the motion to intervene filed 4/15/83, for submission, without oral agrument, on 4/29/83; DIRECTING the movants for intervention to file their brief and any evidentiary materials by 4/22/83; DIRECTING the other parties to respond by 4/29/83. (Copies mailed to counsel; copy furnished to U. S. Attorney.)
Apr. 26	150	Memorandum of applicants for intervention in support of motion to intervene.
Apr. 26	166	Affidavit of Dan Davenport.
Apr. 26	170	Affidavit of V. E. McClellan.
Apr. 26	174	Affidavit of D. B. Mansell.
Apr. 26	178	Affidavit of William M. Bailey.
Apr. 26	182	Motion of applicants for intervention for evidentiary hearing or in the alternative request for oral argument. Referred to Judge Thompson.
Apr. 29	184	United States' response to motion of V. E. McClellan, et al. to intervene. Referred to Judge Thompson.
May 2	191	Defendants' response to plaintiffs' motion to enforce the terms of the 2/16/79 partial consent decree and the 8/18/81 consent decree. Referred to Judge Thompson.

Date	NR	Proceedings
May 5	195	Response of the U.S. to plaintiffs' motion to enforce decrees.
May 6	269	Plaintiffs' response to motion to intervene and defendants' request for discovery. Referred to Judge Thompson.
May 12	282	Applicants for intervention file objection and response to 5/3/83 order. Referred to Judge Thompson.
June 1	290	Defendants' response to plaintiffs' motion to enforce consent decrees. Referred to Judge Thompson.
Oct. 28	309	ORDER granting 4/15/83 motion to intervene filed by McClellan, Bailey, Manson and Davenport, to the extent that the movants may participate in these proceedings on a prospective basis only and may not challenge previously entered orders, judgments, and decrees since intervention is untimely as to these denying motion in all other respects. (Copies mailed to counsel and furnished to U.S. Attorney's office.)
Oct. 28	311	ORDER (1) that the plaintiffs' 4/7/83 motion to enforce the terms of the 2/???? partial consent decree and the 8/18/81 consent decree, be and it is hereby granted to the extent hereafter set forth; (2) that it is hereby declared the defendants' selection procedure for promotion to corporal has an adverse racial impact and that said selection procedure may not be used

Date	NR	Proceedings
		by the defendants for promotion; (3) that on or before 11/10/83, the defendants file with the court a plan to promote to corporal, from qualified candidates at least 15 persons in a manner that will not have an adverse racial impact; (4) that on or before 11/18/83, the plaintiffs, the United States and the defendant-intervenors may file any objections and counter-proposals; (5) if by 11/25/83, the plaintiffs, the United States, and the defendants have filed a promotion plan agreed to by all said parties, the issue of corporal promotions shall be deemed submitted for resolution by the court; and (6) if the plaintiffs, the United States and the defendants file an agreed-to promotion plan, the defendant-intervenors are allowed 7 days from the date of filing to file any objections to the plan. (Copies mailed to counsel; furnished to U.S. Attorney.)
Oct. 28	320	Complaint in intervention of McClellan, Bailey, Mansell and Davenport.
Nov. 3	332	Intervenors' motion to amend or to clarify order allowing intervention. Referred to Judge Thompson.
Nov. 10	344	Defendant State of Alabama Department of Public Safety's motion for reconsideration. Exhibits A and B Attached. Referred to Judge Thompson.

Date	NR	Proceedings
Nov. 10	356	Defendant State of Alabama Department of Public Safety's proposed promotion procedure. Referred to Judge Thompson.
Nov. 10	359	Defendant State of Alabama Personnel Department's response to 10/28/83 order to submit a plan to promote to Corporal from qualified candidates. Referred to Judge Thompson.
Nov. 14	365	Defendant Department of Public Safety's response to defendant-intervenor's motion to amend or to clarify order allowing intervention.
Nov. 17	382	Plaintiffs' response to defendants' proposed promotion procedure Exhibits A & B attached. Referred to Judge Thompson.
Nov. 17	420	Plaintiffs' response to intervenors' motion to amend.
Nov. 18	423	Response of the United States of defendants' proposed promotion procedure.
Nov. 21	437	Response of the United States to intervenors' motion to amend or clarify order allowing intervention.
Nov. 28	441	Defendant-Intervenors' response to order of 11/4/83. Referred to Judge Thompson.
Nov. 28	444	Defendant-Intervenors' response to proposed promotion procedure of defendant Department of Public Safety. Referred to Judge Thompson.
Nov. 28	450	Response of personnel defendants to intervenors' motion. Referred to Judge Thompson.

Date	NR	Proceedings
Nov. 30	452	ORDER denying defendants' motion of 10/19/83; denying defendants' 11/10/83 motion for reconsideration; granting the U.S.'s motion for leave to file a response to proposed protective order; granting defendants' 10/19/83 motion for protective order as further set out in order. (Copies mailed to counsel.)
Dec. 7	454	ORDER (entered 12/8/83) vacating the 11/30/83 order and entering this order in its place. ORDERED that the defendants' 10/19/83, motion to allow administration of entry-level test be denied; that the defendants' 11/10/83 motion for reconsideration be denied and that the United States' 11/16/83, motion for leave to file response to proposed protective order be granted; that the defendants' 10/19/83 motion for protective order be granted; that counsel for the plaintiffs, the U.S., and defendant-intervenors shall notify the entry-level examination or permit the examination to be used or seen by anyone except in connection with this lawsuit; and that said counsel shall make any use or distribution of the examination designed to or having the probable effect of getting into the hand of those who may take the examination. (Copies mailed to counsel.)

Date	NR	Proceedings
Dec. 7	456	Semi-annual report of the State of Alabama of persons employed by the State; filed by plaintiff. Referred to Judge Thompson.
Dec. 9	473	ORDER granting the motion of defendant-intervenors, filed 11/3/83, to amend or clarify order, with leave to the defendant-intervenors to file appropriate motion for class certification pursuant to Fed. R. Civ. P. 23. (Copies mailed to counsel.)
Dec. 15	474	MEMORANDUM OPINION.
Dec. 15	482	ORDER (1) that the plaintiffs' 4/7/83 motion to enforce the terms of the 2/16/?? partial consent decree and 8/18/81 consent decree be granted to the extent hereafter set forth; (2) that the defendants and their agents and employees and each is hereby enjoined and restrained from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank; (3) that the promotion requirement shall remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the defendants have developed and implemented a promotion plan for the rank which meets the prior orders and

Date	NR	Proceedings
		decrees of the court and all other relevant legal requirements; (4) that within 35 days from the date of this order the defendants shall submit to the court for the approval a schedule for the development of promotion procedures for all ranks above the entry-level position; (5) that the plaintiff be allowed 21 days from this date to file a request for interim attorney ??? and (6) that all other relief requested by the plaintiffs in their motion not specifically granted be denied. (Copies furnished U.S. Attorney; mail remaining counsel.)
Dec. 23	487	The United States' motion to alter or amend judgment of 12/15/83. Referred to Judge Thompson.
Dec. 27	492	Defendants' motion to alter or amend judgment of 12/15/83 and to stay order, and request for hearing. Referred to Judge Thompson.
Dec. 27	503	Motion of the defendant-intervenors to alter or amend the judgment of 12/15/83 and to stay its enforcement. Affidavit of William P. Cobb, II attached. Referred to Judge Thompson.
Dec. 27	509	Defendant Personnel Director of the State of Alabama's motion for reconsideration of the court's order of 12/15/83. Referred to Judge Thompson.

Date	NR	Proceedings
Dec. 30	557	Defendant-Intervenors' supplement or amendment to motion to alter or amend judgment of 12/15/83 and to stay its enforcement. Referred to Judge Thompson.
Dec. 30	562	Plaintiffs' response to defendants' motions for reconsideration, to alter or remand judgment, and to stay enforcement of the 12/15/83 order.
1984		
Jan. 6	569	Defendant Alabama Department of Public Safety's response to 12/15/83 court order.
Jan. 6	571	The United States' motion for stay of this court's order of 12/15/83. Referred to Judge Thompson.
Jan. 6	574	Defendant-intervenors' motion for stay of enforcement of the Order rendered 12/15/83. Referred to Judge Thompson.
Jan. 13	578	ORDER that the following motions be and they are hereby denied: defendant-intervenors' 1/6/84 motion to stay; to the United States' 1/6/84 motion to stay defendant Prescott, et al.'s 12/27/83 motion to alter or amend judgment and ??? of order; defendant Alabama Personnel Director's 12/27/83 motion for reconsideration; defendant-intervenors' 12/27 and 12/30/83 motions to alter or amend and to stay enforcement; and

Date	NR	Proceedings
		the United States' 12/23/83 motion to alter or amend judgment. (Copies furnished U.S. Attorney and mailed to remaining counsel.)
Jan. 19	582	Personnel defendant's response to Court Order of 12/15/83
Jan. 23	585	ORDER directing all parties to show cause within 14 days from this date as to why the schedule for development of promotion procedures for all ranks above entry-level filed 1/6/84, should not be approved by the court. (Copies furnished to U.S. Attorney; mailed to remaining counsel.)
Jan. 24	595	Defendant, the Department of Public Safety's Notice of Appeal to the U.S. Court of Appeals, 11th Circuit from the Order granting plaintiffs' 4/7/83 motion in part and enjoining and restraining defendants from failing to promote one black trooper for each white trooper promoted to a higher rank entered 12/15/83, and all other orders relating thereto, and the Order denying all motions filed by defendants to amend, alter, or stay the 12/15/83 order entered 1/13/84. [Copies mailed to: John Carroll, Dennis Balske, Cynthia Drabek, Charles Graddick, Richard Meadows, Rosa Davis, Edward L. Hardin, Jr., Ray Acton, Ken Wallis, James S. Ward—furnished to Judge Thompson, John Bell & W.H.

Date	NR	Proceedings
		Harris, Jr.—certified to: Clerk, USCA w/docket entries—appeal information sheet furnished Edward L. Hardin, Jr.
Jan. 27	599	Defendants-Intervenors, V.E. McClellan, William M. Bailey, D.B. Mansell and Dan Davenport's Notice of Appeal to the U.S. Court of Appeals, 11th Circuit from the Order entered 12/15/83 granting plaintiffs' motion to enforce the terms of 2/16/79 partial consent decree and the 8/18/81 consent decree and further enjoining and restraining the defendants from failing to promote from 12/15/83, forward, for each white trooper promoted to a high rank, one black trooper to the same rank, if there is a black trooper qualified to be promoted to the rank, until approximately 25% of all rank are black, and from the Order denying these defendants' motion to alter, amend or stay the 12/15/83 Order entered 1/13/84. [Copies mailed to: John Carroll, Dennis Balske, Cynthia Drabek, Charles Graddick, Richard Meadows, Rosa Davis, Edward L. Hardin, Jr., Ray Acton, Ken Wallis, James S. Ward—furnished to: Judge Thompson, John Bell & W.H. Harris, Jr.—certified to Clerk, USCA w/docket entries—appeal information sheet furnished James S. Ward.]

Date	NR	Proceedings
Feb. 3	603	Plaintiff United States of America's response to schedule for development of promotion procedures.
Feb. 6	610	Intervenors' response to the order of 1/23/84. Referred to Judge Thompson.
Feb. 8	627	ORDER (1) that the schedule for development of promotion procedures for all above entry-level, filed 2/6/84, by defendant Department of Public Safety adopted 1/19/84 by defendant Personnel Department, be approved; and that defendants be and they are hereby DIRECTED to develop and submit to the promotion procedures in accordance with said schedule; (2) that defendant intervenors' 2/6/84 motion for temporary retention of record in district be and it is hereby granted; (3) that the plaintiffs' 2/6/84 motion for to dismiss, etc., be and it is hereby granted; and that the plaintiffs' motion for order to enforce consent decree, etc., and motion for preliminary injunction be and they are dismissed; and (4) that the plaintiffs' 2/6/84 supplemental motion for interim attorney fees, be set for submission, with oral argument, on 2/17/84. Any briefs, evidentiary materials, and request for a hearing must be filed by said date. (Copies furnished U.S. Attorney and mailed to remaining counsel.) (Certified copy mailed to Clerk, USCA docket entries.)

Date	NR	Proceedings
Mar. 13	3	Plaintiff, United States' Notice of Appeal to the U.S. Court of Appeals, 11th Circuit, from the Order entered 12/15/83; and from the Order entered 1/13/84, denying plaintiff's motion to alter or amend judgment entered 12/23/83. (Copies mailed to: John Carroll, Cynthia Drabek, Richard Meadows, Ray Acton, Ken Wallis, James S. Ward, Edward L. Hardin, Jr.—furnished to: Ken Vines along with appeal information sheet and W.H. Harris Jr.—certified to USCA w/orders appealed from and docket entries.)
June 19	9	Defendant Prescott's statement of completion of procedure for promotion to rank of corporal. Referred to Judge Thompson.
June 19	12	Defendant Prescott's motion to approve selection procedure for promotion to corporal. Referred to Judge Thompson.
June 27	19	Plaintiff United States' response to defendants' motion to approve selection procedure.
June 28	27	Defendant-intervenors' response to defendant Prescott's motion to approve selection procedure for promotion to corporal. Referred to Judge Thompson.
June 29	33	Plaintiffs' response to Defendants' motion to approve selection procedure for promotion to corporal. Referred to Judge Thompson.

Date	NR	Proceedings
June 29	38	Plaintiffs' response to intervenors' objection to implementation of new promotion procedure. (Copy of brief attached.) Referred to Judge Thompson.
July 2	101	Defendant Personnel Board of State of Alabama response to court order of reference defendant Prescott's motion to approve selection procedure for promotion to corporal. Referred to Judge Thompson.
July 27	115	ORDER that defendants are permitted to make promotions as requested; shall make selections from the group as set forth in order; that the one-for-one quota shall not apply in this instance; that the parties may proceed with discovery; the court shall conduct further proceedings to determine if further review would be necessary. (Copies mailed to counsel.)
Aug. 16	118	Defendant Byron Prescott's motion to approve selection procedure for promotion to sergeant. Referred to Judge Thompson.
Aug. 16	121	Defendant Byron Prescott's statement of completion of procedure for promotion to sergeant. Referred to Judge Thompson.
Aug. 24	126	Defendants-Intervenors, V. E. McCellan, William M. Bailey, D. B. Mansell and Dan Davenport's Notice of Appeal from the Order entered

Date	NR	Proceedings
		7/27/84. (Certified copy to Clerk, USCA along w/certified copies of docket entries and order appealed from; copies mailed to James S. Ward [furnished appeal information sheet], Cynthia Drabek, Richard N. Meadows, Dennis N. Balske, Edward L. Hardin, Jr., Ray Acton, Ken Wallis; furnished Ken Vines and Court Reporter, Dub Harris)
Sept. 10		Defendant Prescott's response to court order requesting summary of selection procedure for promotion to sergeant. Attachments. [SEALED per Court's instructions.]
Sept. 14	140	Intervenors' objection to proposed corporal promotion.
Oct. 25	168	Defendant-intervenors's motion for stay of order entered on 7/27/84. Referred to Judge Thompson.
Oct. 25	173	ORDER denying the defendant-intervenors' 10/25/84 motion to stay. (Copies mailed to counsel; furnished to John Bell.)
Oct. 25	174	ORDER that 1) subject to the limitations set forth in this order, defendants Prescott, et al., are permitted to make promotions to State Trooper Sergeant from the group of 13 persons designated "most qualified" pursuant to the selection procedure described in defendants' 9/10/84, submission; 2) defendant Prescott, et al, shall select

Date	NR	Proceedings
		sergeants from the "most qualified" group in a non-discriminatory manner and shall provide actual notice of such promotions to counsel for the parties not less than 5 working days prior to the effective date of such promotions as further set out in this order; 3) that the one-for-one quota for sergeant promotions, ordered 12/15/83, shall not apply to the use of this selection procedure as described in paragraphs 1 and 2 of this order; 4) that the court shall conduct further proceedings upon motion of a party to determine whether the results of future administrations of the selection procedure presented by defendants Prescott, et al., or a similar procedure, may be used to select State Trooper Sergeants without further review. Until further order of this Court, defendants shall make no promotions to State Trooper Sergeant positions other than from the group they have identified as the 13 "most qualified" candidates. (Copies mailed to counsel; furnished U.S. Attorney.)
Dec. 11	182	Defendant Prescott's motion to promote eight lieutenants and three captains. Referred to Judge Thompson.
Dec. 26	201	ORDER granting the defendants' 12/11/84, motion to promote eight lieutenants and three captains. (Copies mailed to counsel; furnished to U.S. Attorney.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

NAACP, PLAINTIFF, PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, INTERVENING PLAINTIFF,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

WALTER L. ALLEN, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE; STANLEY FRAZER, AS PERSONNEL DIRECTOR, PERSONNEL DEPT., STATE OF ALABAMA, HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANTS.

Civil Action No. 2709-N

UNITED STATES OF AMERICA BY JOHN N. MITCHELL, ATTORNEY GENERAL, PLAINTIFF,

v.

JOHN S. FRAZER, AS DIRECTOR, ALABAMA PERSONNEL DEPARTMENT, ET AL., DEFENDANTS.

ORDER

This action was originally brought by the National Association for the Advancement of Colored People on behalf of its members and all similarly situated Negroes in the State of Alabama. The complaint alleged that defendant Allen as Director of the Alabama Department of Public Safety and defendant Frazer as Personnel Director

of the Alabama Personnel Department have followed a continuous and pervasive pattern and practice of excluding Negroes from employment in the Department of Public Safety. At the commencement of the hearing in this case, a motion by Phillip Paradise, Jr., to intervene as a party plaintiff, individually and on behalf of the class similarly situated, was granted.

The Department of Public Safety has two major components: the state troopers and those secretaries, clerks and others who comprise the supporting personnel. There are two other groups closely associated with the department: the trooper cadets and auxiliary troopers. The cadets are men too young to qualify as regular troopers but who receive training from the department toward becoming troopers. The auxiliary force is a group of unpaid volunteers which performs trooper functions under department direction in time of emergency and which is selected on the basis of a recommendation.

Because the agency's supporting staff is essentially identical to those personnel who were the focus of this Court's order in *United States* v. *Frazer,* 317 F.Supp. 1079 (M.D. Ala. 1970) and because these employees are obtained from the defendant Frazer's department, this Court has determined that the appropriate relief as to these positions will be treated as a motion for supplemental relief under the *Frazer* decision.

The state troopers, however, are a different matter. This group is a distinct, specialized force which is unlike the relatively fungible secretaries and clerks who populate every office. For example, the troopers have their own height, weight and age requirements, maintain a separate testing program and require an oral interview. The trooper force has an extensive and specialized training program.

For these reasons, it is clear that the state trooper aspect of this case justifies the filing and prosecution of separate litigation and requires separate adjudication.

The defendants have raised an objection to the NAACP's right to bring this suit. It was, however, the uncontroverted testimony of the association's state president, Mr. Thomas Reed, that some of its members have sought jobs with the department and have been refused. It is well established that the NAACP has standing to assert the rights of its members. *NAACP* v. *Button,* 371 U.S. 415, 428 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293, 296 (1961); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 458 (1958). Any standing question in this case was further obviated by the intervention of plaintiff Paradise. His testimony at the hearing for a temporary restraining order was undisputed that he was refused a trooper application. He contends that the refusal was racially motivated. Accordingly, defendants' motion to dismiss is due to be denied.

Plaintiffs have shown without contradiction that the defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel. In the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *United States* v. *Frazer, supra.*

Under such circumstances as exist in these cases, the courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination.

Hutchins v. *United States Industries, Inc.*, 428 F.2d 303, 310 (5th Cir. 1970); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1052 (5th Cir. 1969). The racial discrimination in this instance has so permeated the Department of Public Safety's employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

While further discrimination will be enjoined, this Court is not inclined to order new tests or testing procedures. This Court recognizes that *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) is authority for the view that if an employment practice which operates to exclude Negroes is unrelated to job performance, the practice is prohibited. Yet there are persuasive reasons for avoiding the imposition of new procedures. First, the Government's selection technique expert, John E. Furcon, testified that it would require a minimum of six months to properly analyze the job of state trooper and compile proper selection methods. The plaintiffs' expert, Dr. Richard S. Barrett, estimated that the process may take as much as four or five years, particularly in light of the fact that there are presently no black troopers. Thus, it would in all likelihood take several years to implement the selection procedures which these experts envision.

Second, Dr. Barrett described Mr. Furcon's cost estimate of $40,000 for the completion of such an analysis as perhaps too low. Imposition of such a study would be an undue burden upon the state. Moreover, in light of the affirmative relief which this Court will require, primary concern over the testing procedures is unnecessary. This is not to say that the state may not undertake some revision of its selection methods if it desires to do so. In fact, the testimony reflects that changes are appropriate and necessary. This Court will simply not order it at this time.

This particular aspect of the state trooper case will be reserved pending receipt of implementation reports to be filed by the defendants.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court:

I. That defendants' motion to dismiss be and the same is hereby denied.

II. That the defendants John S. Frazer, as Director, Alabama Personnel Department and Walter L. Allen, as Director, Alabama Department of Public Safety, their agents, officers, successors in office, employees and all persons acting in concert or participation with them, be and they are hereby enjoined from engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color.

III. It is further ORDERED that the defendants be and they are each hereby enjoined from failing to hire and permanently employ after the probationary period, one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes. This injunction applies to the cadet and auxiliary troopers as well as to the regular troopers. It shall be the responsibility of the Department of Public Safety and the Personnel Department to find and hire the necessary qualified black troopers.

IV. It is further ORDERED that the defendants be and they are hereby enjoined from conducting any training courses for the purpose of training new troopers until

the groups to be given said training courses are comprised of approximately twenty-five (25) percent black trooper candidates.

V. It is further ORDERED that the defendants be and they are each hereby permanently enjoined from failing to hire supporting personnel for the Department of Public Safety in the ratio of one Negro for each white until approximately twenty-five (25) percent of the supporting personnel are black. The decree in *United States* v. *Frazer,* 317 F.Supp. 1079 (M.D. Ala. 1970) is hereby amended insofar as the Department of Public Safety's employment practices are concerned.

VI. It is further ORDERED that eligible and promotional registers heretofore used for the purpose of hiring troopers be and they are hereby abrogated to the extent necessary to comply with this decree.

VII. It is further ORDERED that:

1. The defendants shall assign employees on the basis of their training and ability, without regard to race. Negro employees shall not be assigned to serve exclusively or predominantly Negro clientele.

2. The defendants shall advise the public in all advertisements and announcements that they will appoint and employ persons on an equal opportunity, merit basis, without discrimination on the ground of race or color. In such public announcements, the defendants shall advise potential and actual applicants and employees of their right to be free from discrimination. Said announcements shall be made throughout the State of Alabama within thirty days from the date of this order.

3. The defendants shall adopt and implement a program of recruitment and advertising which will fully advise the Negro citizens of the State of Alabama of the employment opportunities now available to them with the

Alabama Department of Public Safety. The defendants shall institute regular recruitment visits to predominantly Negro schools (vocational, high and college) throughout the State of Alabama, such visits to be made in person by appropriate officials of the Alabama Department of Public Safety.

4. No commitments of employment given by either of the defendants or any of their agents to any applicant or potential applicant, short of actual hiring prior to January 13, 1972, the date the temporary restraining order was entered in the state trooper case, shall be given any priority over the hiring ratio set out in this decree. The present hiring lists, compiled as a result of the discriminatory practices, may be used to hire the white troopers, white trooper cadets and white supporting personnel. New lists, however, must be compiled and utilized for the black troopers, black trooper cadets and black supporting personnel.

5. The defendants shall file through their counsel with this Court within ninety days from the date of this decree a written report setting forth in detail the efforts which have been undertaken to recruit and hire black applicants. The report shall also include the number of vacancies filled among the state troopers, the auxiliary troopers, the cadets and the supporting personnel of the Department of Public Safety during this period and the number of each race hired into each of these groups.

VIII. It is further ORDERED that the costs of this proceeding be and they are hereby taxed to the defendants in Civil Action No. 3561-N, for which execution may issue.

The Court retains jurisdiction over these cases.

Done, this the 10th day of February, 1972.

[SIGNATURE]

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR.,
INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFF,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

E. C. DOTHARD, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

ORDER

This action was originally brought by the National Association for the Advancement of Colored People on behalf of its members and all similarly situated Negroes in the State of Alabama. In its order of February 10, 1972, this Court found that the original defendants had "engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel."[1] In order to end these practices and correct their effects, the Court ordered mandatory and prohibitory injunctive relief. After an interim order of this Court, entered January 5, 1974, the original order was affirmed by the Court of Appeals.[2]

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[1] *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972).

[2] 493 F.2d 614 (5th Cir. 1974).

The current phase of the case arises from a motion for further relief filed by plaintiffs April 22, 1974. A hearing on this motion was held on September 26, 1974. The hearing focused on two principal issues: the allegation that the defendants had artifically restricted the size of the trooper force in order to frustrate the Court's hiring order, and the problem of "black attrition" in the force—the disproportionate failure of blacks hired to achieve permanent trooper status.[3]

The then-Director of the Department of Public Safety testified at the hearing that at the time of the Court's 1972 order there was a critical shortage of troopers and that at least 100 additional troopers were required immediately. The current Director testified that when he took office the need for troopers was at least as great as before. In the 1971 session of the Alabama legislature the administration introduced a bill which would have funded 100 new trooper positions. The evidence is clear that at the time of the Court's hiring order and at all material times thereafter the responsible state officials recognized the need for substantially increasing the size of the trooper force.

In the eight years prior to the Court's 1972 order, the department had hired on the average 40 troopers per year. In the three years immediately preceding the order, the average was over 50. In the two and one-half years following the Court's order, approximately 70 new troopers were hired, of whom 56 were permanently employed. This post-order level of hiring was insufficient to cover normal attrition.

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[3] Plaintiffs' motion for further relief was directed in part to the question of validation of the department's employee selection procedures and tests. By stipulation of the parties, resolution of the validation issue was continued pending the development of new selection procedures.

The Department of Public Safety has two sources of state funds: unconditional appropriations and appropriations conditioned on the state of the general fund and the approval of the Governor. The evidence reflects that the department traditionally spends less than its full unconditional appropriation and that in the five years preceding the 1972 order in this case the approximate average unexpended amounts in the major budget categories were these: salaries—$50,000; equipment purchases—$7,200; other expenses—$121,300. For the fiscal year in which the hiring order was entered and the following fiscal year, the approximate average unexpended amounts were these: salaries—$170,400; equipment purchases—$164,700; other expenses—$461,700. These unexpended amounts revert to the general fund and are not recoverable by the department. These figures establish that the reversions in each category at least tripled after the entry of the hiring order and that during those two years the department had unconditional funds available to cover both the salaries and ancillary expenses associated with the hiring of additional troopers.[4] The evidence further reflects that, contrary to general state policy, appropriations within the "salaries" category were, in the years following the 1972 order, shifted from troopers to support personnel.[5]

On February 10, 1972, the Alabama legislature conditionally appropriated 1.25 million dollars to the Department of Public Safety for fiscal 1971-72 and the same amount for fiscal 1972-73—a total of 2.5 million dollars.[6]

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[4] The salary reversion for the fiscal year ending September 30, 1974, was approximately $479,100.

[5] From 1964 to 1971, an average of approximately 83 percent of the department's salary appropriation was spent on troopers and cadets. This figure fell to 78 percent in fiscal 1971-72 and 75 percent in fiscal 1972-73.

[6] Act No. 254, 1971 Ala. Acts 4519. This is the final, substantially modified version of the administration's "hundred trooper bill."

The appropriation Act provided that part of the funds be used for an across-the-board salary increase, but the balance could be used in any fashion. The language of the statute by implication authorized the use of the funds for the hiring of new troopers. Release of the funds was conditioned on the state of the general fund and the approval of the Governor. The closing balances for fiscal 1971-72 and 1972-73 were approximately $12 million and $17 million.[7] None of the conditional appropriation for 1971-72 was utilized; $785,000 of the second year's funds were released.[8]

The evidence outlined above establishes and this Court now finds that, at the time of and in the years following the Court's 1972 order, the administration and the heads of the Department of Public Safety perceived a need for additional troopers—a need characterized as critical; that there were appropriated and available to the defendants funds in excess of $3 million, a substantial portion of which could have been used for salaries and ancillary expenses for new troopers; and that this money was not spent for the critically needed additional troopers but went unspent or was diverted to other uses. These findings, when combined with the considerable testimony regarding the defendants' reluctance to implement the Court's remedial order by placing black troopers on the state's highways, necessitate the conclusion that the defendants

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[7] The State Budget Officer, James V. Jordan, testified that it is sound fiscal practice to end the fiscal year with approximately a 10 percent "cushion" of unexpended general fund revenues. The evidence indicates that this cushion would have existed even if the entire $2.5 million had been spent.

[8] Mr. Jordan also testified to the percentage of conditionally appropriated funds actually released. For 1971-72, the figure was 35 percent overall and 0 percent for the department; in 1972-73, 65 percent overall and 62 percent for the department.

have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired.

Between February 10, 1972, and the September 26, 1974, hearing in this case, the Department of Public Safety hired 40 black troopers, of whom 27 remained on the force at the time of the hearing.[9] During the same period, the department hired 29 white troopers, all of whom remained on the force. Evidence was presented at the hearing which supports a finding that the high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force. Most of these incidents of discrimination against new black troopers occurred during the early phases of the implementation of the Court's hiring order. The Court sees no reason at this time to modify the hiring order in this regard but reiterates and emphasizes the pertinent portion of that order:

> It is further ORDERED that the defendants be and they are each hereby enjoined from failing to *hire and permanently employ after the probationary period,* one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes.

By order dated August 7, 1974, George C. Wallace, Governor of the State of Alabama, was made a party defendant in this case. The Court subsequently denied the Governor's motion seeking his dismissal as a defendant. In

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[9] As of July 16, 1975, the Attorney General for the State of Alabama advised that the state now has 40 black troopers.

his briefs filed in this case, the Governor again questions the necessity of his inclusion as a defendant. The evidence presented at the September 26, 1974, hearing demonstrates clearly that the Governor is a necessary party if the Court's remedial order is to be fully implemented. The Governor, as noted above, has the ultimate authority for releasing conditionally appropriated funds. In addition, it has been the practice of the directors of the Department of Public Safety to consult with the Governor prior to hiring substantial numbers of new troopers, and in practice the Governor possesses and sometimes exercises the authority to deny such requests for additional troopers.

Upon consideration of the findings and conclusions discussed above, it is ORDERED that the motion for further relief, filed by plaintiffs April 22, 1974, be and is hereby denied insofar as the motion seeks modification of the terms of the Court's order of February 10, 1972, in this case.

It is further ORDERED that:

1. Governor George C. Wallace's motion to be dismissed as a party defendant be and the same is hereby denied.

2. Defendants George C. Wallace, as Governor, State of Alabama; John S. Frazer, as Director, Alabama Personnel Department; and E. C. Dothard, as Director, Alabama Department of Public Safety; their agents, officers, successors in office, employees, and all persons acting in concert or participation with them be and each is hereby ENJOINED from taking any action, or failing to take any action, which action or inaction results in the artificial restriction of the size of the Alabama state trooper force, for the purpose of or which has the effect of delaying or frustrating the achievement of the hiring goal specified in paragraph III of this Court's order in this case dated February 10, 1972.

3. The motion for further relief filed April 22, 1974, insofar as it seeks an adjudication of the validity of the employment criteria and tests of the Alabama Department of Public Safety, be and is hereby continued until further order of the Court.

4. Defendants' motion for "Modification and/or Reconsideration of Certain Findings in the Court's Order of January 5, 1974," be and the same is hereby denied.

5. Defendants file with the Court on or before January 20, 1976, a comprehensive report reflecting, as of January 1, 1976, the number of troopers by race, the number of support personnel by race, the number of troopers and support personnel hired since this order and the number of troopers hired since this order that have achieved permanent status.

Done, this the 5th day of August, 1975.

[SIGNATURE]

United State District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

CLIFTON BROWN, PLAINTIFF-INTERVENOR,

v.

M. L. HILYER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

PROPOSAL PARTIAL CONSENT DECREES

Come the parties, plaintiff Phillip Paradise, Jr., individually and on behalf of the class similarly situated, plaintiff and *amicus curiae* the United States of America (hereinafter referred to collectively as "plaintiffs") and defendants, M. L. Hilyer, as Director of the Alabama Department of Public Safety, his agents, assigns, etc., and Stanley Frazer, as Director of the Alabama Department of Personnel, his agents, assigns, etc., and enter into a consent agreement as to Plaintiffs' Motion for Supplemental Relief as follows:

1. STATEMENT OF PURPOSE

Defendants recognize the continuing effect of the orders issued by this Court on February 10, 1972 and August 5, 1975. Defendants will have as an objective within the Department of Public Safety an employment and promotion system that is racially neutral. In this respect, defendants and their officers, agents and employees, successors

and all persons acting in concert with them or any of them, in the performance of their official functions, agree not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks. In addition, defendants agree not to engage in any act or practice which discriminates on the basis of race in hiring, promotion, upgrading, training, assignment, discharge or otherwise discriminate against any employee of, or any applicant, or potential applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race. Defendants agree that any time after entry of this partial consent decree the plaintiffs may apply to this Court for an order which would enforce the terms of the partial consent decree or apply for any other relief which may be appropriate.

II. NEW DISCIPLINARY REVIEW PROCEDURES

Defendants will distribute the attached Notice of Disciplinary Review Procedures to all Department employees of the trooper rank. In this way, all troopers will be apprised of the availability of procedures for them to obtain a review of certain disciplinaries contained within their files, including oral and written counseling, oral reprimands, written reprimands, suspensions, transfers and pay raise denials, which said troopers contend were the result of racial discrimination. These procedures are fully described in the attached Notice of Disciplinary Review Procedures and are fully incorporated herein and agreed to by the parties.

This notice will be distributed to all employees of the trooper rank no later than thirty (30) days from the date of this decree. Plaintiffs and defendants will submit names of the persons they have selected for the Disclipinary Review Board within thirty (30) days of the date of this decree,

and they request the Court to select the third Board member at its earliest convenience. Board members who are not members of the Department of Public Safety will be compensated at a reasonable rate by the Department for Board service.

III. RACE RELATIONS PROGRAM

In order to further their objective of a racially neutral employment and promotion system, defendants will establish a comprehensive Equal Employment Opportunity (EEO) Program. This program will be designed to provide a vehicle for airing grievances concerning allegations of racially disparate treatment and to further and promote race relations within the Department. Defendants agree to appoint an employee of the Department of Public Safety as the Department-wide EEO officer. This officer will have responsibility for supervising the Equal Employment Opportunity Program within the Department and monitoring Departmental compliance with this and other court decrees. This officer will also conduct a class or series of classes concerning race relations for each state trooper academy class and for each supervisory in-service training program held by the Department. This officer will also be responsible for instituting an EEO grievance procedure, which will provide all troopers with access to specially trained EEO officers when such troopers have complaints of a racial nature. This grievance procedure will be implemented as an addition to present grievance procedures. The Department-wide EEO officers will make recommendations to the Director concerning resolutions of these racial grievances.

Defendants also agree to appoint an EEO officer for each state trooper district in the State and to provide him with special training in the field of race relations. These

district EEO officers will process racial grievances and forward them to the Department-wide EEO officer for resolution, and will promote and further race relations within each individual district.

Defendants will, within 60 days, publish a comprehensive description of the EEO program and distribute it to all state trooper personnel, along with a letter from the Director encouraging all personnel to utilize the program.

IV. PROMOTIONS

A. The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal (hereinafter referred to as the "objective" or "above-stated objective.") In accordance with that objective defendants agree to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

B. In accordance with the above-stated objective defendants agree to develop for the position of corporal a promotion procedure which (1) would be developed by defendants no later than one year from the signing of this Consent Decree, (2) would be submitted upon completion of the formulation of the promotion procedure to counsel for plaintiffs who would have at least 60 days to review the promotion procedure and would be able to request from defendants any information relevant to the proposed promotion procedure, and (3) would be submitted upon completion of plaintiffs' review to this court for approval on the basis of the above-stated objective.

In the interim, defendants agree to utilize the state merit system for all promotions to corporal, during which time defendants will promote at least three black troopers to the rank of corporal.

Upon completion of validation of a new procedure for promotion to corporal, defendants, in accordance with the above-stated objective, agree to begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of lieutenant, captain and major.

V. TERMINATIONS

Defendants agree to review all terminations of state troopers made from August 5, 1975 through March 1, 1979. If the Department finds that any termination resulted in whole or in part from racial discrimination, each such person shall be offered re-employment at the level at which he was terminated, unless such termination occurred prior to graduation from the trooper Academy, in which case such person shall be required to complete the entire Academy training course.

A report of this review will be presented to counsel for plaintiffs as soon as practicable, but not later than April 15, 1979. All reinstatements will be made by April 15, 1979, with the exception of any individual terminated during his Academy training, who shall be reinstated at the next Academy training session. Plaintiffs except from this portion of the decree with respect to class member Charles Gregory Potts. Plaintiffs contend that Mr. Potts should be reinstated irrespective of the review conducted by defendants.

VI. ATTORNEY FEES AND COSTS

The defendants hereby agree to pay all court costs and related expenses incurred by plaintiffs, as well as reasonable attorneys fees to counsel for the plaintiffs.

/s/ EDWARD L. HARDIN, JR.
Edward L. Hardin, Jr.
Attorney for Defendants

/s/ DENNIS N. BALSKE
Dennis N. Balske
John L. Carroll
Attorneys for Plaintiffs

/s/ GERALD S. HARTMAN
Gerald S. Hartmann
Attorney for United States of America

TO: All Department Employees Holding the Rank of State Trooper
FROM: M. L. Hilyer, Director

NOTICE OF DISCIPLINARY REVIEW PROCEDURES

Judge Frank M. Johnson, Jr. has approved of a new procedure whereby the Department of Public Safety will review certain disciplinary actions taken by the Department against its employees holding the rank of state trooper, which disciplines were given between August 5, 1975 and March 1, 1979.

All troopers are hereby given permission to review their 201 files. Any trooper who, after reviewing his file, feels that any discipline given him during this period, including oral and written counselings, oral and written reprimands, suspensions, transfers and pay denials, was given him as a result of racial discrimination, shall give notice thereof to the Department in writing. This written notice *shall* specify the dates and nature of the disciplinary which the trooper contends was racially motivated, as well as the name(s) of the Department personnel whose conduct the trooper contends was racially motivated.

Each claim so presented will then be assigned a date, at which time each trooper will be given an opportunity to present his contentions to an impartial review board. This board will consist of three persons, as follows: one private citizen chosen by Judge Frank M. Johnson, Jr.; one person chosen by the attorneys representing the plaintiff class; and one person chosen by the Department of Public Safety. Troopers presenting such claims may, on their own, obtain an attorney, who will be given an opportunity to participate in the hearing. The Department may respond to such claims through an attorney of its choice.

Attorneys for both sides will be afforded an opportunity to present opening statements, to examine and cross-examine witnesses, to introduce documentary evidence and to give closing arguments. Although the hearing will be conducted in a trial-like manner, formal rules of evidence will not be followed.

If after hearing both sides, a majority of the Board finds the claim to be established by a preponderance of the evidence, any and all records relating to such disciplinaries shall be removed from all three of said trooper's personnel files and given to the trooper. No copies shall be retained by the Department. If the Board finds that a trooper has not established his claim, no action will be taken. Neither side has a right to appeal from the determination of the Board.

All written request for review in accordance with this notice must be submitted within sixty (60) days of the date of this notice. The Department gives its assurance that no adverse action will be taken against troopers who utilize these procedures.

_____

M.L. Hilyer

_____

Date

ORDER

Upon consideration of the foregoing proposed partial consent decree executed and presented by all parties in this case, and with the specific understanding by this Court that the orders made and entered herein on February 10, 1972, and August 5, 1975, continue in full force and effect, it is the ORDER, JUDGMENT and DECREE of this Court that said partial consent decree be and is hereby approved and the parties are hereby ORDERED to implement same in accordance therewith and in accordance with the orders of this Court of February 10, 1972, and August 5, 1975.

Done, this the 16th day of February, 1979.

[SIGNATURE]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

CLIFTON BROWN, PLAINTIFF-INTERVENOR,

v.

M. L. HILYER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

AGREEMENT OF COUNSEL FOR THE PARTIES

Defendants hereby agree to utilize the following promotion procedure for all promotions to the rank of corporal during the period in which a new promotion procedure is being validated. Defendants further agree to move to incorporate this letter into the attached Consent Decree on March 1, 1979.

1. Defendants will administer a written examination to all troopers seeking promotion to the rank of corporal as soon as practicable (the same examination that was given in 1975).

2. The examination will be considered in conjunction with other factors, as follows:

a) Examination – 40%
b) Supervisory interviews – 40%
c) Seniority – 10%
d) Last three evaluations – 10%

3. When these categories are combined, a list of results will be compiled, a copy of which will be provided to plaintiffs (this list will include each trooper's scores in all four categories).

4. If three or more blacks score in the upper fifty percentile, at least three blacks will be promoted to corporal as described below. If less than three black troopers score in the upper fifty percentile, no promotions to corporal will be made from this list during the interim period, and defendants will develop an alternate procedure which will insure the promotion of at least three black troopers during the interim period.

5. During the interim period, defendants will promote at least three, but not more than ten, troopers to the rank of corporal. The actual number of promotions will be determined by the number of vacancies which open during the interim period.

6. If four or more blacks score in the upper fifty percentile, the procedure, will work as follows:

a) The first three vacancies will be filled by blacks scoring in the upper fifty percentile;

b) The next three available vacancies will be filled by those with the highest rankings on the list;

c) If a seventh vacancy becomes available, provided that vacancies four through six were filled by whites, it will be filled by a fourth black who scored in the upper fifty percentile; and

d) If any other vacancies after the seventh vacancy become available, they will be filled by the troopers ranking highest on the list, irrespective of race.

/s/ EDWARD L. HARDIN, JR.
Edward L. Hardin, Jr.
Attorney for Defendants

/s/ DENNIS N. BALSKE
Dennis N. Balske
John L. Carroll
Attorneys for Plaintiffs

/s/ GERALD S. HARTMAN
Gerald S. Hartmann
Attorney for United States of America

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

CONSENT DECREE

On February 16, 1979, this Court entered a Partial Consent Decee in resolution of certain issues raised in Plaintiffs' Motion for Supplemental Relief. Part IV of the Partial Consent Decree provides in part as follows:

> The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal . . . In accordance with that objective defendants agree to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines [on Employee] Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

Defendants have submitted to plaintiffs Paradise, et al., and the United States [hereinafter referred to collectively as plaintiffs] and to the Court a proposed selection proce-

dure for State Trooper Corporal positions and a validity study for the written examination component of that selection procedure. Defendants have presented no validity evidence in support of the components of the proposed selection procedure other than the written examination. Plaintiffs and defendants disagree whether the proposed selection procedure is in conformity with the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed. Reg. 38290, 28 C.F.R. Sec. 50.14 (1978) [hereinafter, *Uniform Guidelines*]. Because the selection procedure has not yet been administered, the adverse impact of the selection procedure, if any, is not known.

Defendants recognize their obligation under the Partial Consent Decree to utilize a selection procedure which has little or no adverse impact on blacks seeking promotion to corporal. The parties agree that it would be in the best interest of all parties to avoid unnecessary litigation and to put a selection procedure for State Trooper Corporals in place as soon as possible. Accordingly, the parties have entered into this Consent Decree governing the use of the proposed selection procedure for promotion of State Troopers to State Trooper Corporal positions.

NOW, THEREFORE, IT IS HEREBY ORDERED that the proposed selection procedure for State Trooper Corporal, submitted to this Court May 21, 1981, shall be administered and used as follows:

1. The proposed selection procedure shall be administered and scored as set out in defendants' letter to plaintiffs and this Court dated May 21, 1981 and in the proposed selection procedure and validation report accompanying that letter. Each of the four components of the procedure shall comprise the percentage of the total score for the selection procedure that is set out in defendants' May 21, 1981 letter.

2. Any State Trooper with permanent status for at least 24 months as of October 15, 1981 shall be permitted to take the written examination for State Trooper Cor-

poral. It is recognized that the selection procedure provides for a score for length of service such that thirty months' service at the time the selection procedure is administered shall equal seventy points and sixty months' service (or more) shall equal one hundred points. Accordingly, one point more than seventy shall be awarded to each applicant for each month of service more than thirty months, up to a maximum of one hundred points.

3. Defendants shall compile a list of candidates for promotion for State Trooper Corporal positions based upon the composite numerical scores of applicants on the selection procedure. In determining eligibility, defendants may apply the standards for length of service set out in the proposed selection procedure. Under this Decree, defendants shall not be required to promote any State Trooper who does not have at least 30 months' service as a State Trooper at the time of the promotion, provided that the length of service requirement is applied consistently. Defendants shall provide a copy of this list, identifying each applicant by race, to plaintiffs.

4. The list of candidates for promotion shall be reviewed to determine whether the selection procedure has an adverse impact against black applicants. Adverse impact shall be determined by reference to the *Uniform Guidelines*, by comparing the numbers (by race) of applicants with the numbers (by race) of persons passing the procedure and by comparing the numbers (by race) of applicants with the number (by race) of persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order from the list of eligible candidates. For purposes of this Decree, "applicants" shall include all persons who take the written examination for State Trooper Corporal. Adverse impact shall be determined for each of the following groups of "persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order:" (a) the first eight

corporal promotions, which are expected to be awarded as soon as selections based upon the proposed selection procedure are approved by the Court; (b) all corporal promotions expected within one year of the administration of the selection procedure, based upon the good faith estimate of the Department of Public Safety; and (c) all corporal promotions expected during the life of the list of eligible candidates, based upon the good faith estimate of the Department of Public Safety as to the length of time the list will be used and the Department's anticipated staffing needs during that time. Adverse impact shall be determined by reference to Section 4D of the *Uniform Guidelines, supra*, and the answer to question 12 of the *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed.Reg. 11996, March 2, 1979.

5. If the selection procedure has little or no adverse impact against black applicants, selections shall be made in rank order from the list described in paragraph 2 of this Decree. Whether or not the selection procedure has "little or no adverse impact" will be measured by the "four-fifths rule" set forth in Section 4 D of the *Uniform Guidelines, supra*. If the parties cannot agree whether the selection procedure has an adverse impact, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made pending resolution of the question of adverse impact.

6. If the parties agree, or the Court finds, that the selection procedure has an adverse impact, promotions shall be made in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure. Defendants shall submit to plaintiffs their proposal for making promotions in conformity with the Partial Consent Decree and with this Decree.

If the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made until the parties have agreed in writing or the Court has ruled upon the method to be used for making promotions with little or no adverse impact.

7. If the selection procedure has an adverse impact against blacks seeking promotion to corporal, defendants shall examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and shall revise the procedure so as to avoid adverse impact in the future. Defendants shall provide plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test. The parties shall attempt to agree upon modifications in the selection procedure for future administrations. If the parties are unable to agree upon the procedure to be used after the first administration of the selection procedure and the method of using that procedure, the matter shall be submitted to the Court for resolution.

ORDERED this 18th day of August, 1981.

[SIGNATURE]

United States District Judge

AGREED AND CONSENTED TO:

/s/ CYNTHIA DRABEK
Cynthia Drabek
Attorneys for Plaintiff
United States of America

/s/ DENNIS N. BALSKE
Dennis N. Balske
Attorney for plaintiffs
Paradise, et al.

/s/ LEON KELLY, JR.
Leon Kelly, Jr.
Attorney for Defendants

LAW OFFICE OF
EDWARD L. HARDIN, JR., P.C.
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1025 NORRIS AVENUE
BIRMINGHAM, AL 35203
(203) 220-2679

May 21, 1981

Hon. John Carroll
Southern Proverty Law Center
1001 S. Hull Street
Montgomery, Alabama 36101

Re: *Paradise* v. *Shoemaker*
U.S. District Court of Alabama
Case No. 3561-N

Dear John:

As per the Court's order of May 16, I am enclosing to you one copy of each of the following:

1. Proposed Examination of State Trooper Corporal;
2. Alabama Merit System Report of Validation Study State Trooper Corporal;
3. Alabama Department of Public Safety Service Rating Form;
4. Procedure for Evaluating Length of Service State Trooper Corporal;
5. Supervisory Promotional Evaluation State Trooper Corporal Form;
6. Definitions of Evaluation Factors State Trooper Corporal;

7. Promotional Examination Rating Form (Defines terms used in form described in #5 above);
8. Information and Guides Supervisory Evaluation State Trooper Corporal.

Our proposed promotional procedure accords the following weights to the above factors:

1. Written test	60%
2. Length of Service	10%
3. Supervisory Evaluation	20%
4. Service Ratings	10%

The Service Ratings score to be used in the above procedure would be the average of the candidate's three most recent service ratings.

It is my understanding that we have agreed that our production of this material relieves the Defendant of the obligation to answer the Interrogatories and Request for Production filed by the Southern Poverty Law Center on April 16, and that, should you have any questions after your examination of the material we are producing today, you will pursue the answers to those questions thru depositions or additional interrogatories. Please inform me immediately if I have misunderstood our agreement on this matter.

Regarding any questions you might have, if you will convey them to me informally first via telephone or letter, it may be that I can get them answered for you without the necessity of formal discovery proceedings, thereby expediting this whole matter.

If I can be of further assistance, please feel free to call me.

Your truly,

/s/ BUDDY
Leon (Buddy) Kelly, Jr.

LKjr/jws
Encl.

cc: Honorable Myron Thompson
U.S. District Judge
Mr. Tommy Flowers
State of Alabama Personnel Department

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

PLAINTIFFS' MOTION TO ENFORCE THE TERMS OF THE FEBRUARY 16, 1979 PARTIAL CONSENT DECREE AND THE AUGUST 18, 1981 CONSENT DECREE

Plaintiffs, by the undersigned counsel, respectfully move the Court for an order enforcing the terms of the February 16, 1979 Partial Consent Decree and the August 18, 1981 Consent Decree. Specifically, plaintiffs seek an order requiring defendant:

(1) to implement "a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal." See Partial Consent Decree of February 16, 1979, p.4 § IV(A).

(2) to develop and implement a new procedure for promotion to the positions of sergeant, lieutenant, captain and major, which will have little or no adverse impact upon blacks seeking promotion to these positions. See *id.* at § B.

(3) to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of this Court's previous orders and the parties' consent decrees. See Consent Decree of August 18, 1981, p.4 ¶ 6.

(4) to pay reasonable attorney's fees to plaintiffs' counsel in this matter. The following paragraphs disclose the reasons why this Court should grant plaintiffs' request.

A. History of this Litigation

On February 10, 1972, the Court found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discrimination in hiring. . . ." *NAACP v. Allen*, 340 F.Supp. 703, 705 (M.D.Ala. 1972). The Court ordered defendants to hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." *Id.* at 706. This order was affirmed on appeal and, in 1975, restated emphatically in granting plaintiffs' motion for supplemental relief.

On February 16, 1979, a partial consent decree was approved by the Court, following the second reopening of the case by plaintiffs. This decree required, *inter alia*, that defendants institute "a promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedure*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal." See Decree at p.4, § IV(A). It gave defendants one year to accomplish this objective, after which defendants were "to begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of lieutenant, captain and major." *Id.* § IV(B).

On April 9, 1981, the defendants moved the Court to approve its newly developed "Corporal's Promotional Examination." Plaintiffs objected to it on the ground that it did not conform to the requirements of the *Uniform Guidelines,* but in view of the defendants' expression of an urgent need for more corporals, eventually entered into the August 18, 1981 Consent Decree. This Decree permitted defendants to utilize the protested promotional procedure, but required that the results by reviewed to determine whether they adversely impacted black applicants prior to the making of any promotions. The Decree further provided that if the new procedure adversely impacted black candidates: (1) "promotions shall be made in a manner that does not result in adverse impact;" (2) "[d]efendants shall submit to plaintiffs their proposal for making promotions in conformity with the Partial Consent Decree and with this Decree;" and (3) "[i]f the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution." See Consent Decree of August 18, 1981, p.4, ¶6.

Finally, in the event of adverse impact, the Decree requires defendants to "examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and . . . revise the procedure so as to avoid adverse impact in the future." According to the Decree, defendants must provide this data to plaintiffs, whereafter the parties shall attempt to agree upon modifications. In the event of disagreement, "the matter shall be submitted to the Court for resolution." *Id.* p.5, ¶7.

B. Factual Developments

The new selection procedure unquestionably adversely impacted black applicants. Two hundred sixty-two

troopers applied for promotion to the rank of corporal. Black applicants were ranked as follows: 96, 100, 121, 130, 132A, 137, 144, 154, 157, 161, 163, 165, 169, 183, 191, 193, 194, 195, 197, 204, 205, 206, 210, 211, 212, 213, 218, 220, 221, 223, 224, 226, 228, 229, 230, 231, 232, 234, 236, 238, 241, 243, 244, 246, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262. See Promotion Register, attached hereto as Exhibit 1. Whites held the top 95 positions, whereas blacks held the bottom 14 positions. Of the 59 blacks who applied, only 4 ranked in the top half, and they were at the bottom of the top half (#'s 96, 100, 121 and 130).

In apparent recognition of the adverse impact of this register, defendants have recently offered to promote black applicants at a rate of 20% (1 of every 5 promotions will be black).[1] Plaintiffs have rejected this offer. Defendants have not "revise[d] the procedure so as to avoid adverse impact in the future" and have not "provide[d] plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test." See August 18, 1981 Decree at p.5, ¶7.

Thus, no blacks (or whites) have been promoted to corporal in the last four years. There is no valid promotion procedure in place for promotions to corporal, sergeant, lieutenant, captain or major. Under the terms of the 1979 Partial Consent Decree and the 1981 Consent Decree, this Court must now decide: (1) what percentage of the forthcoming 18-20 promotions to corporal should be black; (2) when to require defendants to implement a valid procedure for promotions to corporal; and (3) when to require defendants to implement valid procedures for promotions to sergeant, lieutenant, captain and major.

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[1] Defendants stated that they need to promote approximately 18 to 20 troopers to the rank of corporal.

C. Plaintiffs' Position

Plaintiffs submit that blacks should be promoted to corporal at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure. Such an order will serve two purposes: (1) it will encourage defendants to develop a valid promotional procedure as soon as possible; and (2) it will help to alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department.

At the present time there are four black corporals. All four were promoted in 1979 under the terms of the Partial Consent Decree. There are 67 corporals. Thus, blacks comprise 6% of the corporals at this time. Assuming the Department promotes 20 troopers to the rank of corporal, blacks will comprise 16% of the corporals if plaintiffs' 1 for 1 suggestion is implemented, whereas they will only comprise 9.2% if defendant's 1 for 5 plan is followed.[2]

Plaintiffs' request is much more in line with the Court's previous orders than is defendants' plan. The ultimate goal of the Court's orders is a force that is 25% black. At the present time, according to defendants, the force is approximately 22-23% black. However, due to defendants' reluctance to promote its black troopers, all but four of these troopers hold the lowest trooper rank. If the Department is ever to be truly integrated, approximately 25% of its force at every rank should be black. A requirement that defendants promote 10 black of the next 20 corporals, thereby raising black representation in the corporal rank from 6% to 16% is both a reasonable and necessary[3] step to the attainment of this Court's stated goal.

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[2] After 20 promotions there will be a total of 87 corporals. Under Plaintiffs' plan, there would be 14 black corporals, whereas under defendants' plan, only 8 corporals would be black.

[3] It would perhaps not be necessary if the defendants had developed their own valid promotion procedure as required by the 1979 Decree. It is defendants' perennial non-compliance that necessitates this action.

If the Court has any hesitation to order this relief, it need look no further than Judge Johnson's Order and Memorandum of April 13, 1979. There, the Court rejected the defendants' request for an amendment to the original order changing the requirement for black employment from 25% of the trooper force to 25% of entry-level troopers. Judge Johnson's reasoning fits the instant situation. It is reproduced here with the hope that the Court will restate it in an order granting plaintiffs' present request:

> In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. As the Fifth Circuit has recognized, the order in this case does not seek to grant proportional representation in public employment to the black citizens of Alabama. *NAACP* v. *Allen*, 493 F.2d at 621. The order in this case is but the necessary remedy for an intolerable wrong.

It has been four years since Judge Johnson wrote these words. Yet the only change in the makeup of the Department was the promotion of four blacks to Corporal as mandated by the 1979 Partial Consent Decree. Not only has the Department failed to promote any of its black troopers, but it had done nothing to insure that its black troopers will ever play a truly representative role in the operation of the Department. No valid promotion

mechanism has yet been developed by which they can begin moving from the lowest rank, trooper, toward the highest rank, major, even though blacks have been employed in the Department for eleven years.

In order to insure that blacks finally gain the opportunity to move toward positions of responsibility within the Department, the Court should order defendants: (1) to immediately promote 18 to 20 employees to the corporal position, depending on need, on a 1 for 1 basis; (2) to develop and implement a valid promotional procedure for the corporal's position within one year;[4] to develop and implement valid promotional procedures for sergeant, lieutenant, captain and major within two years;[5] and to pay plaintiffs' counsel reasonable attorneys fees for the prosecution of this action.[6]

Respectfully submitted,

/s/ DENNIS N. BALSKE

Dennis N. Balske
John L. Carroll
1001 S. Hull Street
P.O. Box 2087
Montgomery, AL 36103-2087
Attorneys for Plaintiffs

---

[4] In order to insure compliance, certain procedural safeguards should be included, such as open discovery to plaintiffs' counsel, a deadline for production of the finished product to plaintiffs' counsel, etc. Moreover, the Court should order that all future necessary promotions to corporal be made on a 1 for 1 basis until the Court has approved a valid promotional procedure.

[5] The procedural safeguards discussed in n.4 should be included, and the Court should order that beginning two years from the entry of its order, all promotions to sergeant, lieutenant, captain and major be made on 1 for 1 basis if a valid procedure for promotions, approved by the Court, is not in place.

[6] Bryon Prescott was recently appointed by Governor Wallace to replace defendant Shoemaker. His name should be substituted for that of defendant Shoemaker in future pleadings and orders.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon Ed Hardin and Cynthia Drabek by U.S. first class mail, postage prepaid, this 7th day of April, 1983.

/s/ DENNIS N. BALSKE
Attorney for Plaintiffs

STATE OF ALABAMA
Personnel Department
402 State Administrative Building
Montgomery, Alabama 36130-2301

December 30, 1981

MEMORANDUM

TO: Ms. Cynthia Drabek
Mr. Edward L. Hardin
Mr. Dennis Balske
Mr. Frank Ussery

FRANK: Thomas G. Flowers, Chief
Recruitment and Examination

SUBJECT: *Enclosed Register*

Enclosed for your review is a computer listing of names, grades, sex/color, and rank of individuals on the promotional register for State Trooper Corporal as a result of the examination administered October 24, 1981, in accordance with Judge Thompson's order.

The sex/color code should be interpreted as follows:

1. White Male
2. White Female
3. Black Male
4. Black Female
5. Other Male
6. Other Female

TGF/brh
Enclosure

Exhibit 1

STATE OF ALABAMA
PERSONNEL DEPARTMENT
EXAMINATION REGISTER CARDS
DECEMBER 30, 1981

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Parsons, Gerald R.	7222	96.79		31	1	001	
Johnson, Lindon, C.	7222	96.00		32	1	002	
Smith, Jimmie W.	7222	95.79		41	1	003	
Cox, James F.	7222	95.77		34	5	004	
Cawyer, Larry D.	7222	95.66		38	1	005	
Abrett, James H.	7222	95.65		32	1	006	
Luther, Curtis W.	7222	95.64		30	1	007	
Wolfe, Steven P.	7222	95.61		34	1	008	
Hall, Danny B.	7222	95.54		31	1	009	
Davis, Puger W.	7222	95.51		40	1	010	
Sanderson, Roy L.	7222	95.46		30	1	011	
Yates, Joseph L.	7222	95.45		31	1	012	
Livingston, Donald L.	7222	95.44		40	1	013	
Legg, John M.	7222	95.40		36	1	014	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Sumja, Roy G.	7222	95.36		32	1	015	
Mansell, Donald B.	7222	95.30		33	1	016	
Bailey, William M.	7222	95.20		35	1	017	
Kipp, Philip H. Jr.	7222	95.09		40	1	018	
Sides, Frederick G.	7222	94.99		40	1	019	
Hulak, Michael G.	7222	94.89		32	1	020	
Conrad, David J.	7222	94.76		34	1	021	
Duncan, Marvin B.	7222	94.62		34	1	022	
Kelley, Wilburn L.	7222	94.48		29	1	023	
Taylor, Gerald R.	7222	94.48		32	1	023	
Cheatham, Tommy W.	7222	94.46		35	1	025	
Yance, John E.	7222	94.45		38	1	026	
Goree, Donald E.	7222	94.42		33	1	027	
Atwell, Donald H.	7222	94.33		34	1	028	
Thompson, Harold	7222	94.32		31	1	029	
Branum, W. Albert	7222	94.31		46	1	030	
Condrey Kenneth H.	7222	94.25		30	1	031	
Jordan, Wiley O.	7222	94.19		34	1	032	
Woody, Robert A.	7222	94.11		33	1	033	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Ward, James S.	7222	94.08		41	1	034	
Wright, Curtis A.	7222	94.08		32	1	034	
Taylor, Thomas G.	7222	94.06		32	1	036	
Warlick, Arthur H.	7222	93.98		46	1	037	
Scheer, Robert S.	7222	93.92		34	1	038	
Pouncey, James E.	7222	93.90		31	1	039	
Bell, Jack O. Jr	7222	93.88		42	1	040	
McElvaine Cecil A.	7222	93.85		32	1	041	
Rhegness, William L.	7222	93.81		34	1	042	
Steward, Rober V.	7222	93.78		46	1	043	
Smith, Seaborn A. Jr.	7222	93.71		40	1	044	
Smith, Richard M.	7222	93.53		38	1	045	
Ruye, Marvin J. III	7222	93.51		33	1	046	
Silveira, Steven H.	7222	93.48		35	1	047	
McClellan Victor E.	7222	93.46		40	1	048	
Tucker, Donald H.	7222	93.40		30	1	049	
Green, Roy R.	7222	93.37		30	1	050	
Roberts, Sanders P.	7222	93.36		40	1	051	
Strickland, Elree M.	7222	93.32		33	1	052	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Halcomb, Philip W.	7222	93.30		32	1	053	
Brock, Thomas L.	7222	93.28		32	1	054	
Yates, Alfred M.	7222	93.23		31	1	054	
Neal, William A.	7222	93.24		31	1	056	
Davenport, Henry D.	7222	93.23		37	1	057	
Galin, Frederick C.	7222	93.20		34	1	058	
Carson, Harold L.	7222	93.18		48	1	059	
Hamlet, Thomas L.	7222	93.16		33	1	060	
Elliott, Jerry W.	7222	93.15		31	1	061	
Arrington, Loyd C.	7222	93.12		34	1	062	
Small, Gene P.	7222	93.07		28	1	063	
Sutton, Cary P.	7222	93.06		34	1	064	
Cribbs, Ronnie	7222	93.04		33	1	065	
Womack, Williams H.	7222	93.01		40	1	066	
Jackson, Bob M.	7222	92.98		33	1	067	
Robbins, Kermit V.	7222	92.94		35	1	068	
Atwell, Jerry R.	7222	92.90		29	1	069	
Reid, Johnny R.	7222	92.85		34	1	070	
Fox, Gary L.	7222	92.83		35	1	071	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Cox, Robert J.	7222	92.82		44	1	072	
Johnson, James W.	7222	92.81		43	1	073	
Williams, Don A.	7222	92.77		33	1	074	
Maschi, Joseph P.	7222	92.72		29	1	075	
Tucker, Donald G.	7222	92.65		36	1	076	
Kearley, Harry N.	7222	92.60		32	1	077	
Bibb, Wiley L.	7222	92.55		30	1	078	
Cook, Abner C.	7222	92.54		52	1	079	
Brown, Cliffton L.	7222	92.51		32	3	080	
Strength, Freddie L.	7222	92.49		32	1	081	
Willis, Willie	7222	92.49		47	1	081	
Barnett, Michael E.	7222	92.43		34	1	083	
Brzezinski, Joseph	7222	92.42		34	1	084	
Hassett, George H.	7222	92.35		36	1	085	
Gorman, Robert W.	7222	92.32		34	1	086	
Harrison, Robert A.	7222	92.31		36	1	087	
Odom, Edward L.	7222	92.30		34	1	088	
Phelps, William J.	7222	92.27		43	1	089	
Peevy, Mark D.	7222	92.24		36	1	089A	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Cottingham, Jerry F.	7222	92.22		40	1	090	
Pridmore, Marvin L.	7222	92.17		42	1	091	
Slayton, Charles F.	7222	92.13		34	1	092	
Williams, Larry	7222	92.12		39	1	093	
Callihan, Brent L.	7222	92.11		28	1	094	
Hampton, Leon	7222	92.03		35	3	096	
Berry, Donald R. Jr.	7222	91.93		32	1	097	
Mobley, Richard R.	7222	91.86		33	1	098	
Snell, Ralph L.	7222	91.83		46	1	099	
Calvin, Roy E.	7222	91.78		34	3	100	
Mothershed, Willie E.	7222	91.63		37	1	101	
Lee, Fred A. Jr.	7222	91.66		38	1	102	
Fant, James S.	7222	91.63		32	1	103	
Butts, Timothy P.	7222	91.60		30	1	104	
Linder, Joseph L.	7222	91.59		39	1	105	
Mize, Noel J.	7222	91.59		50	1	105	
Colbert, Walter L.	7222	91.57		46	1	107	
Richardson, Bernard	7222	91.48		??	1	108	
Yeager, Edward C.	7222	91.44		45	1	109	
Wise, Benny L.	7222	91.36		34	1	110	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Blakely, Michael A.	7222	91.31		30	1	111	
Hattaway, Howard D.	7222	91.30		43	1	112	
Mays, Kenneth N.	7222	91.29		30	1	113	
Christenberry, John J.	7222	91.21		37	1	114	
Stubes, Waymon E.	7222	91.21		44	1	114	
Davidson, Jeffrey N.	7222	91.20		33	1	116	
Reeves, Freddie R.	7222	91.17		34	1	117	
Green, William F.	7222	91.10		34	1	118	
Holmes, Marvette	7222	90.95		44	1	119	
Holt, Roger W.	7222	90.92		30	1	120	
Kyser, David C.	7222	90.91		32	3	121	
Walden, Joseph E.	7222	90.89		35	1	122	
Harris, Ronald E.	7222	90.86		33	1	123	
Waller, Jack A.	7222	90.83		32	1	124	
Mayfield, Charlie C.	7222	90.82		35	1	125	
Walden, Carter D.	7222	90.80		38	1	126	
Cook, David W.	7222	90.75		32	1	127	
Clements, Paul J.	7222	90.71		46	1	128	
Golden, John M.	7222	90.71		30	1	128	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Smith, Raymon D.	7222	90.70		28	3	130	
Flanagan, Elam E.	7222	90.65		51	1	131	
Jenkins, Lenon E.	7222	90.61		32	1	132	
Isaac, Johnny L.	7222	90.61		31	3	132A	
Mahaney, Patrick D.	7222	90.57		30	1	133	
Lusk, Bobby B.	7222	90.55		40	1	134	
West, Charles G.	7222	90.55		34	1	134	
Garner, Karen D.	7222	90.51		32	1	136	
Leak, George W.	7222	90.41		34	1	137	
Means, Arthur Jr.	7222	90.41		38	3	137	
Duke, David L.	7222	90.32		27	1	139	
Hartzog, Henry B.	7222	90.31		35	1	140	
Burnette, James L.	7222	90.25		34	1	141	
Thomas, Roy J.	7222	90.25		38	1	141	
Hood, James A.	7222	90.23		27	1	143	
Dawson, Elbert Jr.	7222	90.14		34	3	144	
Adams, Dale W.	7222	90.12		32	1	145	
Beasley, Perry A.	7222	90.10		30	1	146	
Burgess, Buford R.	7222	90.02		47	1	147	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Turner, Jackie P.	7222	90.02		38	1	147	
Bowen, Tommy J.	7222	90.00		37	1	150	
Olive, William R.	7222	89.96		40	1	151	
Brown, Bobby W.	7222	89.90		37	1	152	
Blackwood, James W.	7222	89.87		39	1	153	
Worthey, Paul E.	7222	89.83		29	3	154	
Lawler, Roane T.	7222	89.77		35	1	155	
Shannon, Eldon E.	7222	89.75		30	1	156	
Stewart, Harold	7222	89.72		30	3	157	
Howell, Claudus R.	7222	89.71		29	1	158	
Wooten, Billy R.	7222	89.66		44	1	159	
Blue Clarence M. III	7222	89.62		32	1	160	
Anderson, Tyrone	7222	89.57		34	3	161	
McCarty, William R.	7222	89.52		??	1	162	
Hood, Harvey J.	7222	89.47		30	3	163	
Raburn, Willie D.	7222	89.47		45	1	163	
Watkins, Cleveland R.	7222	89.45		36	3	165	
Dit, Catherine M.	7222	89.44		25	2	166	
Bush, Paul W.	7222	87.38		40	1	167	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Grimmett, Elwin D.	7222	89.35		39	1	168	
Thomas, Charles E.	7222	89.34		32	3	169	
Kirk, Michael E.	7222	89.32		34	1	170	
Helms, Robert W.	7222	89.21		36	1	171	
Batson, William F.	7222	89.18		38	1	172	
Noles, Thurman C. Jr.	7222	89.12		38	1	173	
Mason, B bby G.	7222	89.10		41	1	174	
Canterbury, Charles E.	7222	89.04		35	1	175	
Griffin, Johnny E.	7222	89.02		34	1	176	
Patrick, Lonnie D.	7222	88.98		34	1	177	
Bryant, Michael R.	7222	88.97		32	1	178	
Lindsey, Norman R.	7222	88.94		41	1	179	
Coffey, Lavdid R.	7222	88.87		41	1	180	
Harris, James B.	7222	88.86		35	1	181	
Paustian, William H.	7222	88.80		37	1	182	
Head, Bobby J.	7222	88.77		29	3	183	
Passmore, Joseph C.	7222	88.71		41	1	184	
Kelley, Roy W.	7222	88.68		38	1	185	
Parker, Robert L.	7222	88.60		44	1	186	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Nuonan, Patrick J.	7222	89.57		46	1	187	
Cline, John M. Jr.	7222	89.43		47	1	188	
Melton, Eugene A.	7222	88.42		??	1	189	
Robertson, Joe B.	7222	88.42		41	1	189	
Spencer, Clemmie	7222	88.37		34	3	191	
Wood, Jimmy M.	7222	88.28		40	1	192	
Rutledge, Osburn Jr.	7222	88.26		34	3	193	
Bush, Richard H. Jr.	7222	88.17		38	3	194	
Burton, Anthony J.	7222	88.15		29	3	195	
Posey, Harold R.	7222	88.11		40	1	196	
Powell, Charles E.	7222	88.08		28	3	197	
Wright, Lynnwood A.	7222	87.99		37	1	198	
Sansom, Dan J.	7222	87.79		33	1	199	
Holley, James C.	7222	87.69		40	1	200	
Whitworth, Ronald W.	7222	87.67		34	1	201	
Smith, Larkus M.	7222	87.65		35	1	202	
Greene, Everett B.	7222	87.56		39	1	203	
Ross, Willie L.	7222	87.40		32	3	204	
Hill, James B.	7222	87.32		26	3	205	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Herring, Gerard W.	7222	87.05		29	3	206	
Jones, Robert W.	7222	87.02		31	1	207	
Tapley, John R.	7222	86.97		34	1	208	
Price, Lindsey E.	7222	86.92		46	1	209	
Taylor, William H.	7222	86.90		33	3	210	
Flowers, Archie Jr.	7222	86.79		30	3	211	
Palmore, Herbert N.	7222	86.77		34	3	212	
Cunningham, Maurice L.	7222	86.72		32	3	213	
Rines, David A.	7222	86.66		35	1	214	
Pritchett, Luther J.	7222	86.59		48	1	215	
Green, Howard A.	7222	86.52		??	1	216	
Dean, James E.	7222	86.50		35	1	217	
Johnson, Rector Jr.	7222	86.38		26	3	218	
Cobb, Larry B.	7222	86.18		48	1	219	
White, Willie L.	7222	86.15		27	3	220	
Darden, Daniel M. IV	7222	86.06		37	3	221	
Smith, Billy E.	7222	86.06		30	3	221	
Reid, Andre L.	7222	85.89		30	3	223	
White, Willie J.	7222	85.52		32	3	224	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Lambert, Randolph	7222	85.42		39	1	225	
Abrams, Gregory	7222	85.29		27	3	226	
Pall, Michel A.	7222	85.21		26	1	227	
Taylor, William H. Jr.	7222	85.17		26	3	228	
Allen, Zack W. Jr.	7222	84.95		28	3	229	
Bonner, Lester, Jr.	7222	84.92		28	3	230	
Hughes, John M.	7222	84.67		33	3	231	
Berry, Arthur S.	7222	84.54		33	3	232	
Maynor, Benny L.	7222	84.45		37	1	233	
Stanford, Lannie	7222	84.41		30	3	234	
McLeod, Jesse M. III	7222	84.13		42	1	235	
Johnson, Peter	7222	84.04		34	3	236	
Pynes, Ronald D.	7222	84.03		32	1	237	
Wright, Nathaniel	7222	83.98		31	3	238	
Higgins, Robert L.	7222	83.95		50	1	239	
Vardaman, James C.	7222	83.93		46	1	240	
Knox, Jim H.	7222	83.34		28	3	241	
Day, Robert S. Jr.	7222	83.26		31	1	242	
Malls, Clifford W.	7222	83.19		??	3	243	

Name	Class Code	Grade	V.P.	Age	Sex & Color	Rank	Option
Barren, Charles	7222	83.09		36	3	244	
Stanton, Nathan L.	7222	82.82		33	1	245	
Steele, Gerald	7222	82.77		32	3	246	
White, Billy M.	7222	82.57		37	1	247	
Crittenden, Bobby L.	7222	82.54		36	1	248	
Vaughner, Willie	7222	82.41		32	3	249	
Finch, Hubert Jr.	7222	82.34		29	3	250	
Marbury, Curtis L.	7222	81.92		41	3	251	
Bagby, James A.	7222	81.78		33	3	252	
Stallworth, Warren A.	7222	81.48		28	3	253	
Ligon, Robert L.	7222	81.40		36	3	254	
Jackson, Ira Jr.	7222	80.86		31	3	255	
Sewell, Joseph M.	7222	80.74		25	3	256	
Tyson, Ernest E.	7222	80.46		34	3	257	
Mahomes, Nathan	7222	79.73		27	3	258	
Hawkins, William G.	7222	78.73		44	3	259	
Montgomery, Isaac L.	7222	77.47		38	3	260	
Knox, Richard R.	7222	76.03		26	3	261	
Morse, Glenn D.	7222	73.70		29	3	262	

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

V. E. MCCLELLAN, WILLIAM M. BAILEY, D. B. MANSELL AND DAN DAVENPORT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPLICANTS FOR INTERVENTION

MOTION TO INTERVENE

Come now V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport, on behalf of themselves and all others similarly situated, by and through their attorney of record, and move this Court for leave to intervene as a matter of right in this cause pursuant to Rule 24(a) of the Federal Rules of Civil Procedure or permissibly pursuant to Rule 24(b) of the Federal Rules of Civil Procedure so as to assert the claims set forth in their complaint, a copy of which is attached hereto, and as grounds therefor set down and assign the following, separately and severally:

1. V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport are citizens of the State of Alabama and are regular employees holding positions in the classi-

fied service of the State of Alabama as defined in Code of Alabama 1975, § 36-26-1, *et seq.* and who are currently merit system employees of the Alabama Department of Public Safety in positions or ranks below that of Corporal. They seek to intervene and file a complaint on behalf of themselves and the following similarly situated individuals: all those persons who are citizens of the State of Alabama and who are regular employees holding positions in the classified service of the State of Alabama as defined in Code of Alabama 1975, § 36-26-1, *et seq.* and who are currently merit system employees of the Alabama Department of Public Safety in positions or ranks below that of Corporal who have taken the Corporal's Promotional Examination pursuant to the Consent Decree entered in this cause on August 18, 1981, and who after taking the same were placed or ranked in terms of eligibility for promotion from one (1) through seventy-nine (79) on the Corporal Promotional Register which was compiled thereafter. (Hereinafter referred to as "the class"). McClellan, Bailey, Mansell and Davenport and the class described above are all white and took the Corporal's Promotional Examination described above as did all eligible applicants for the same, whether said applicants were white or black.

2. McClellan, Bailey, Mansell and Davenport and the class they represent, although not parties thereto and although their interests were not adequately considered or protected thereby, are substantially effected and are in fact governed in any attempt to be promoted from their current rank or position to Corporal, including their eligibility therefor, by the terms and provisions of a partial consent decree entered in this cause on February 16, 1979, and a subsequent consent decree entered in this cause on August 18, 1981, as well as, if granted, either in whole or in part, the Plaintiffs' Motion To Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The

August 18, 1981, Consent Decree filed on April 7, 1983, a copy of which is attached hereto and made a part hereof as set out in full as exhibit "A".

3. McClellan, Bailey, Mansell and Davenport and the class they represent are currently eligible for promotion from their current or present rank or position to that of Corporal as the need and number for the same are required by their employer and have successfully passed and accomplished the requirements of and the Corporal's Promotional Examination described above, as is further evidenced by the Promotion Register attached as exhibit one to the April 7, 1983, motion of the Plaintiffs referred to above.

4. As a result, McClellan, Bailey, Mansell and Davenport and the class they represent have an interest in the subject matter of this action and they are so situated that the disposition of this matter may, as a practical matter, impair or impede their ability to protect their interests and therefore they should be permitted to intervene in this action on the following grounds:

A. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A," impede, impair, contradict, conflict with, limit, abbrogate or otherwise interfere with the provisions of Code of Alabama 1975, § 36-26-1, *et seq.*, also known as the Merit System Act, and any rules or regulations promulgated thereunder, relating to or concerning promotions.

B. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", are unreasonable, illegal, unconstitutional or against public policy.

C. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintifffs in their April 7, 1983, motion attached hereto as exhibit "A", unnecessarily trammel the interests of McClellan, Bailey, Mansell, Davenport and the class they represent.

D. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", amount to unlawful reverse racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States and the violation of rights guaranteed to McClellan, Bailey, Mansell, Davenport and the class they represent by 42 USCA § 1983.

E. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", violate the rights guaranteed to McClellan, Bailey, Mansell, Davenport and the class they represent by 42 USCA § 1981.

F. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", are unreasonable, unconstitutional, illegal or against public policy in that there is not sufficient or adequate statistical evidentiary support concerning the number of black troopers eligible for promotion to Corporal, in that the various orders and consent decrees entered in this cause contain detailed provisions which reach the objectives of the Plaintiffs' claims for relief and in that the provisions and terms of the

February 16, 1979, partial consent decree, the August 18, 1981, consent decree and the Plaintiffs' motion of April 7, 1983, have a harsh impact on innocent third parties who, despite merit, suffer from the blemish of race, to-wit: McClellan, Bailey, Mansell, Davenport and the class they represent.

G. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", are unreasonable, illegal, unconstitutional or against public policy in that they substantially interfere and effect a protectable interest of McClellan, Bailey, Mansell, Davenport and the class they represent, to-wit: the right to compete for the benefits of public employment on the basis of individual worth and accomplishment, fairly ascertained, without the influence of irrelevant factors such as race.

H. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A," are unreasonable, illegal, unconstitutional or against public policy in that they severely impair the career aspirations and promotional expectations of McClellan, Bailey, Mansell, Davenport and the class they represent.

I. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, motion attached hereto as exhibit "A", bind or may bind McClellan, Bailey, Mansell, Davenport and the class they represent without affording them an opportunity to be heard and present evidence concerning the claims outlined above.

5. The interests of McClellan, Bailey, Mansell, Davenport and the class they represent are not adequately represented by the existing parties.

6. The claims of McClellan, Bailey, Mansell, Davenport and the class they represent and the main action have questions of law or fact in common and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Alternatively, because they are subject to service of process and because their joinder will not deprive the Court of jurisdiction over the subject matter of this action, McClellan, Bailey, Mansell, Davenport and the class they represent move this Court to enter an Order pursuant to Rule 19 of the Federal Rules of Civil Procedure joining them as indispensible parties in that in their absence complete relief cannot be accorded among those already parties or that they claim an interest relating to the subject of the action and are so situated that the disposition of the action in their absence may as a practicable matter impair or impede their ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. In support of this motion, McClellan, Bailey, Mansell, Davenport and the class they represent adopt and incorporate herein by reference all the grounds, separately and severally, alleged in support of their motion to intervene.

WHEREFORE, PREMISES CONSIDERED, McClellan, Bailey, Mansell, Davenport and the class they represent respectfully pray that they be allowed to intervene in this proceeding pursuant to either Rule 24(a) or 24(b) of the Federal Rules of Civil Procedure for the reasons so stated and that the Court permit them to file their proposed Complaint in Intervention or in the alter-

native enter an Order joining them as indispensible parties pursuant to Rule 19 of the Federal Rules of Civil Procedure.

Respectfully submitted

Stuart & Ward

/s/ JAMES S. WARD

James S. Ward
Attorney for Applicants for Intervention

OF COUNSEL
Stuart & Wood
1933 Montgomery Highway Suite 200
Birmingham, Alabama 35209
939-0276

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing pleading on the Honorable Dennis N. Balske, P.O. Box 2087, Montgomery, Alabama 36103-2087, the Honorable Edward L. Hardin, Jr., P.O. Box 1214, Birmingham, Alabama 35201 and the Ms. Cynthia Drabek, Federal Enforcement Section, United States Department of Justice, Washington, D.C. 20530 by placing a copy of same in the United States mail, postage prepaid and properly addressed on this the 13th day of April, 1983.

/s/ JAMES S. WARD

Of Counsel

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

PLAINTIFFS' MOTION TO ENFORCE THE TERMS OF THE FEBRUARY 16, 1979 PARTIAL CONSENT DECREE AND THE AUGUST 18, 1981 CONSENT DECREE

Plaintiffs, by the undersigned counsel, respectfully move the Court for an order enforcing the terms of the February 16, 1979 Partial Consent ~~D~~decree and the August 18, 1981 Consent Decree. Specifically, plaintiffs seek an order requiring defendant:

(1) to implement "a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal." See Partial Consent Decree of February 16, 1979, p.4 § IV(A).

(2) to develop and implement a new procedure for promotion to the positions of sergeant, lieutenant, captain and major, which will have little or no adverse impact upon blacks seeking promotion to these positions. See *id.* at § B.

(3) to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of this Court's previous orders and the parties' consent decrees. See Consent Decree of August 18, 1981, p.4 ¶6.

(4) to pay reasonable attorneys' fees to plaintiffs' counsel in this matter. The following paragraphs disclose the reasons why this Court should grant plaintiffs' request.

A. History of this Litigation

On February 10, 1972, the Court found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discrimination in hiring. . . ." *NAACP v. Allen*, 340 F.Supp. 703, 705 (M.D.Ala. 1972). The Court ordered defendants to hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." *Id.* at 706. This order was affirmed on appeal and, in 1975, restated emphatically in granting plaintiffs' motion for supplemental relief.

On February 16, 1979, a partial consent decree was approved by the Court, following the second reopening of the case by plaintiffs. This decree required, *inter alia*, that defendants institute "a promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedure*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal." See Decree at p.4, § IV(A). It gave defendants one year to accomplish this objective, after which defendants were "to begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of lieutenant, captain and major." *Id.* § IV(B).

On April 9, 1981, the defendants moved the Court to approve its newly developed "Corporal's Promotional Examination." Plaintiffs objected to it on the ground that it did not conform to the requirements of the *Uniform Guidelines*, but in view of the defendants' expression of an urgent need for more corporals, eventually entered into the August 18, 1981 Consent Decree. This Decree permitted defendants to utilize the protested promotional procedure, but required that the results be reviewed to determine whether they adversely impacted black applicants prior to the making of any promotions. The Decree further provided that if the new procedure adversely impacted black candidates: (1) "promotions shall be made in a manner that does not result in adverse impact," (2) "[d]efendants shall submit to plaintiffs their proposal for making promotions in conformity with the Partial Consent Decree and with this Decree; and (3) "[i]f the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution." See Consent Decree of August 18, 1981, p. 4, ¶6.

Finally, in the event of adverse impact, the Decree requires defendants to "examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and . . . revise the procedure so as to avoid adverse impact in the future." According to the Decree, defendants must provide this data to plaintiffs, whereafter the parties shall attempt to agree upon modifications. In the event of disagreement, "the matter shall be submitted to the Court for resolution." *Id.* p.5, ¶7.

B. Factual Developments

The new selection procedure unquestionably adversely impacted black applicants. Two hundred sixty-two troopers applied for promotion to the rank of corporal. Black applicants were ranked as follows: 96, 100, 121,

130, 132A, 137, 144, 154, 157, 161, 163, 165, 169, 183, 191, 193, 194, 195, 197, 204, 205, 206, 210, 211, 212, 213, 218, 220, 221, 223, 224, 226, 228, 229, 230, 231, 232, 234, 236, 238, 241, 243, 244, 246, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262. See Promotion Register, attached hereto as Exhibit 1. Whites held the top 95 positions, whereas blacks held the bottom 14 positions. Of the 59 blacks who applied, only 4 were ranked in the top half, and they were at the bottom of the top half (#'s 96, 100, 121 and 130).

In apparent recognition of the adverse impact of this register, defendants have recently offered to promote black applicants at a rate of 20% (1 of every 5 promotions will be black).[1] Plaintiffs have rejected this offer. Defendants have not "revise[d] the procedure so as to avoid adverse impact in the future" and have not "provide[d] plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test." See August 18, 1981 Decree at p.5, ¶7.

Thus, no blacks (or whites) have been promoted to corporal in the last four years. There is no valid promotion procedure in place for promotions to corporal, sergeant, lieutenant, captain or major. Under the terms of the 1979 Partial Consent Decree and the 1981 Consent Decree, this Court must now decide: (1) what percentage of the forthcoming 18-20 promotions to corporal should be black; (2) when to require defendants to implement a valid procedure for promotions to corporal; and (3) when to require defendants to implement valid procedures for promotions to sergeant, lieutenant, captain and major.

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[1] Defendants stated that they need to promote approximately 18 to 20 troopers to the rank of corporal.

C. Plaintiffs' Position

Plaintiffs submit that blacks should be promoted to corporal at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure. Such an order will serve two purposes: (1) it will encourage defendants to develop a valid promotional procedure as soon as possible; and (2) it will help to alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department.

At the present time there are four black corporals. All four were promoted in 1979 under the terms of the Partial Consent Decree. There are 67 corporals. Thus, blacks comprise 6% of the corporals at this time. Assuming the Department promotes 20 troopers to the rank of corporal, blacks will comprise 16% of the corporals if plaintiffs' 1 for 1 suggestion is implemented, whereas they will only comprise 9.2% if defendant's 1 for 5 plan is followed.[2]

Plaintiffs' request is much more in line with the Court's previous orders than is defendants' plan. The ultimate goal of the Court's orders is a force that is 25% black. At the present time, according to defendants, the force is approximately 22-23% black. However, due to defendants' reluctance to promote its black troopers, all but four of these troopers hold the lowest trooper rank. If the Department is ever to be truly integrated, approximately 25% of its force at every rank should be black. A requirement that defendants promote 10 black of the next 20 corporals, thereby raising black representation in the corporal rank from 6% to 16% is both a reasonable and necessary[3] step to the attainment of this Court's stated goal.

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[2] After 20 promotions there will be a total of 87 corporals. Under plaintiffs' plan, there would be 14 black corporals, whereas under defendants' plan, only 8 corporals would be black.

[3] It would perhaps not be necessary if the defendants had developed their own valid promotion procedure as required by the 1979 Decree. It is defendants' perennial non-compliance that necessitates this action.

If the Court has any hesitation to order this relief, it need look no further than Judge Johnson's Order and Memorandum of April 13, 1979. There, the Court rejected the defendants' request for an amendment to the original order changing the requirement for black employment from 25% of the trooper force to 25% of entry-level troopers. Judge Johnson's reasoning fits the instant situation. It is reproduced here with the hope that the Court will restate it in an order granting plaintiffs' present request:

> In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. As the Fifth Circuit has recognized, the order in this case does not seek to grant proportional representation in public employment to the black citizens of Alabama. *NAACP* v. *Allen*, 493 F.2d at 621. The order in this case is but the necessary remedy for an intolerable wrong.

It has been four years since Judge Johnson wrote these words. Yet the only change in the makeup of the Department was the promotion of four blacks to Corporal as mandated by the 1979 Partial Consent Decree. Not only has the Department failed to promote any of its black troopers, but it had done nothing to insure that its black troopers will ever play a truly representative role in the operation of the Department. No valid promotion

mechanism has yet been developed by which they can begin moving from the lowest rank, trooper, toward the highest rank, major, even though blacks have been employed in the Department for eleven years.

In order to insure that blacks finally gain the opportunity to move toward positions of responsibility within the Department, the Court should order defendants: (1) to immediately promote 18 to 20 employees to the corporal position, depending on need, on a 1 for 1 basis; (2) to develop and implement a valid promotional procedure for the corporal's position within one year;[4] to develop and implement valid promotional procedures for sergeant, lieutenant, captain and major within two years;[5] and to pay plaintiffs' counsel reasonable attorneys fees for the prosecution of this action.[6]

Respectfully submitted,

/s/ DENNIS N. BALSKE

Dennis N. Balske
John L. Carroll
1001 S. Hull Street
P.O. Box 2087
Montgomery, AL 36103-2087
Attorneys for Plaintiffs

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[4] In order to insure compliance, certain procedural safeguards should be included, such as open discovery to plaintiffs' counsel, a deadline for production of the finished product to plaintiffs' counsel, etc. Moreover, the Court should order that all future necessary promotions to corporal be made on a 1 for 1 basis until the Court has approved a valid promotional procedure.

[5] The procedural safeguards discussed in n.4 should be included, and the Court should order that beginning two years from the entry of its order, all promotions to sergeant, lieutenant, captain and major be made on 1 for 1 basis if a valid procedure for promotions, approved by the Court, is not in place.

[6] Bryon Prescott was recently appointed by Governor Wallace to replace defendant Shoemaker. His name should be substituted for that of defendant Shoemaker in future pleadings and orders.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon Ed Hardin and Cynthia Drabek by U.S. first class mail, postage prepaid, this 7th day of April, 1983.

/s/ DENNIS N. BALSKE
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

V.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

V. E. MCCLELLAN, WILLIAM M. BAILEY, D. B. MANSELL AND DAN DAVENPORT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPLICANTS FOR INTERVENTION

AMENDMENT TO MOTION TO INTERVENE

Come now V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport on behalf of themselves and all others similarly situated, by and through their attorney of record, and hereby amend their motion to intervene by adding the following to the end of paragraph two of their original motion to intervene:

Specifically, V. E. McClellan, William M. Bailey, D. B. Mansell, Dan Davenport and the class they represent aver that the provisions and terms of the consent decrees aforementioned allow rank order promotion to Corporal

only if there is little or no adverse impact upon blacks and that the aforesaid decrees recite or contain no evidentiary support to justify this limitation.

Respectfully submitted

Stuart & Ward

/s/ JAMES S. WARD

James S. Ward
Attorney for Applicants
for Intervention
1933 Montgomery Highway
Suite 200
Birmingham, Alabama 35209
939-0276

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing Amendment to Motion to Intervene on the Honorable Dennis N. Balske, P.O. Box 2087, Montgomery, Alabama 36103-2087, the Honorable Edward L. Hardin, Jr., P.O. Box 1214, Birmingham, Alabama 35201 and Ms. Cynthia Drabek, Federal Enforcement Section, United States Department of Justice, Washington, D.C. 20530, by placing a copy of same in the United States mail, postage prepaid and properly addressed on this the 15 day of April, 1983.

/s/ JAMES WARD

Of Counsel

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

V. E. MCCLELLAN, WILLIAM M. BAILEY, D. B. MANSELL AND DAN DAVENPORT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPLICANTS FOR INTERVENTION

COMPLAINT OF INTERVENORS

I

JURISDICTION

1. This action for appropriate equitable relief and declaratory judgment arises under the Fourteenth Amendment of the United States Constitution and 42 USC §1981 and § 1983. Jurisdiction of this Court is invoked pursuant to 28 USC § 1343 and § 2201 and § 2202. In this action, Intervenors and the class they represent seek to have the provisions of the consent decrees entered in this cause on February 16, 1979, and August 18, 1981, which deal with corporal promotion, as well as the relief prayed for in the Plaintiffs' Motion To Enforce The Term Of The Febru-

ary 16, 1979, Partial Consent Decree And The August 18, 1981, Partial Consent Decree declared unreasonable, illegal, unconstitutional or against public policy, seek appropriate equitable relief enjoining the operation of these provisions and motion and seek relief which ensures that any future or further promotions to Corporal be accomplished in a constitutional and non-discriminatory manner without infringing upon the Intervenors' and the class they represent constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution and rights guaranteed to them by 42 USC § 1981 and § 1983.

PARTIES

2. V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport (hereinafter referred to as "Intervenors") are white citizens of the State of Alabama and are regular employees holding positions in the classified service of the State of Alabama as defined in Code of Alabama 1975, § 36-26-1, *et seq.* and who are currently merit system employees of the Alabama Department of Public Safety in positions or ranks below that of Corporal. Intervenors have taken the Corporal's Promotional Examination pursuant to the consent decree entered in this cause on August 18, 1981, as did all eligible applicants for the same, whether said applicants were white or black and are substantially effected and are currently governed in any attempt to be promoted from their current rank or position to Corporal, including eligibility for that position, by the terms and provisions of a partial consent decree entered in this cause on February 16, 1979, and a subsequent consent decree entered in this cause on August 18, 1981, as well as, if granted, either in whole or in part, the Plaintiffs' Motion To Enforce The Term Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree. Intervenors are cur-

rently eligible for promotion from their current or present rank or position to that of Corporal as the need and number for the same are required by their employer and have successfully passed and accomplished the requirements of and the Corporal's Promotional Examination described above.

The remaining parties in this action have been identified in previous pleadings filed in this cause. Intervenors and the class they represent allege that the Defendants in this cause are now and at all times material hereto were acting under the color and pretense of the statutes, ordinances, regulations, customs and/or usages of the State of Alabama.

II

CLASS ACTION AVERMENTS

A. INTERVENORS' CLASS

1. This action is brought by the Intervenors individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure as a class action on behalf of the following described individuals:

(a) All those persons who are white citizens of the State of Alabama and who are regular employees holding positions in the classified service of the State of Alabama as defined in Code of Alabama 1975, § 36-26-1, *et seq.* and who are currently merit system employees of the Alabama Department of Public Safety in positions or ranks below that of Corporal who have taken the Corporal's Promotional Examination pursuant to the consent decree entered in this cause on August 18, 1981, along with all eligible applicants for the same, whether said applicants were white or black, and who after taking the same were placed or ranked in terms of eligibility for promotion from one (1) through seventy-nine (79) on the

Corporal Promotional Register which was compiled thereafter and who are substantially effected and who are now governed in any attempt to be promoted from their current rank or position to that of Corporal, including their eligibility for that position, by the terms and provisions of a partial consent decree entered in this cause on February 16, 1979, and a subsequent consent decree entered in this cause on August 18, 1981, as well as, if granted, either in whole or in part, the Plaintiffs' Motion To Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree and who are currently eligible for promotion from this current or present rank or position to that of Corporal as the need and number for the same are required by their employer and who have successfully passed and accomplished the requirements of and the Corporal's Promotional Examination described above.

B. PRE-REQUISITE TO CLASS ACTION

2. Intervenors aver as follows:

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the class in that it must be determined whether the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate to Corporal promotion, as well as the relief sought by the Plaintiffs in their April 7, 1983, Motion To Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree (a) impede, impair, contradict, conflict with, limit, abborgate or otherwise interfere with provisions of Code of Alabama 1975, § 36-26-1,

et seq. also known as the Merit System Act, and any rules or regulations promulgated thereunder, relating to or concerning promotions, (b) are unreasonable, illegal, unconstitutional or against public policy, (c) are unreasonable, illegal, unconstitutional or against public policy in that they unnecessarily trammel the interests of the Intervenors and the class, (d) amount to unlawful reverse racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States and the violation of rights guaranteed to the Intervenors and the class by 42 USC § 1981 and § 1983, (e) are unreasonable, unconstitutional, illegal or against public policy in that there was not sufficient and adequate statistical evidentiary support concerning the number of black troopers eligible for promotion to Corporal recited or contained in the decrees, in that the various orders and consent decrees entered in this cause contain detailed provisions which reach the objectives of the Plaintiffs' claims for relief and in that the impact of the provisions and terms of the aforementioned consent decrees and motion have a harsh impact on innocent third parties who, despite merit, suffer from the blemish of race, (f) are unreasonable, illegal, unconstitutional or against public policy in that they substantially interfere and effect a protectable interest of the Intervenors and the class, to wit: the right to compete for the benefits of public employment on the basis of individual worth and accomplishment, fairly ascertained, without the influence of irrelevant factors such as race, (g) are unreasonable, illegal, unconstitutional or against public policy in that they severely impair the career aspirations and promotional expectations of the Intervernors and the class, (h) bind or

may bind the Intervenors and the class without affording them an opportunity to be heard and present evidence concerning the claims outlined above.

3. The claims of the Intervenors are typical of the claims of all the members of the class.

4. The Intervenors and their attorneys will fairly and adequately protect the interest of all the members of the class.

COUNT ONE

1. On February 10, 1972, over eleven (11) years ago, the Court entered an order in this cause finding that prior to that date, the Defendants had engaged in a blatant and continuous pattern and practice of discrimination in *hiring* in the Alabama Department of Public Safety, both as to troopers and supporting personnel. Concommitantly, the Court enjoined the Defendants from engaging in employment practices, including recruitment, examination, appointment, training, promotion, retention or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicants for employment, on the ground of race or color. (paragraph two). Intervenors aver that this prohibition prevented the Defendants from engaging in the activities described above in a manner which discriminated against *whites* as well as blacks.

In addition, the Court ordered the Defendants to hire one black trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama State Trooper force comprised of Negros (paragraph three). Intervenors are informed and believe and on such information and belief aver that the Defendants have substantially complied with this requirement.

2. On February 16, 1979, a partial consent decree was executed by the parties and approved by the Court. In this decree, Defendants agreed to have as an objective the utilization of a promotion procedure which was fair to all ap-

plicants and which promotion procedure when used either for screening or ranking would have little or no adverse impact upon blacks seeking promotion to Corporal. In accordance with that objective, Defendants agreed to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to Corporal (paragraph IVA). However, this decree neither recites nor contains any appropriate statistical evidentiary support for the Defendants' agreement contained therein or for their agreement to utilize a promotion procedure which will have little or no adverse impact upon blacks seeking promotion to Corporal.

Moreover, Plaintiffs aver that Defendants also agreed in this consent decree to have as an objective within the Department of Public Safety, ". . . an employment and promotion system that is racially neutral." and agreed not to engage in any act or practice which discriminates on the basis of race in hiring, promoting, upgrading, training, assignment, discharge or otherwise discriminated against any employee of, or any applicant, or potential applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race. (paragraph I) Intervenors aver that these agreements prohibit discrimination against whites as well as blacks.

3. On August 18, 1981, another consent decree was entered in this cause. In that decree, the parties agreed that the proposed selection procedure for Corporal promotion shall be administered and scored as set out in the Defendant's letter to Plaintiffs and the Court dated May 21, 1981, and in the proposed selection procedure and validation report accompanying that letter, that information being attached to and made a part of this consent decree.

Intervenors allege that it is clear from a reading of paragraphs one and two of that consent decree that the provisions thereof were to apply equally to all applicants for the examination for State Trooper Corporal, regardless of the race of the applicant. Intervenors further aver that the Plaintiffs agreed to the procedure for, the make-up, including the components thereof, the administering and scoring of the written examination for State Trooper Corporal outlined in that consent decree by their approval of that consent decree.

4. The August 18, 1981, consent decree provided that the Defendants shall compile a list of candidates for promotion for State Trooper Corporal positions based upon the composite numerical scores of applicants on the selection procedure and allow Defendants, in determining eligibility, to apply the standards for length of service set out in the proposed selection procedure. (paragraph three)

5. Despite the provisions described in Paragraphs three and four above, the August 18, 1981, consent decree allowed selections or promotions to Corporal to be made in rank order from the list described in paragraph two of the decree only if the selection procedure had little or no adverse impact againt black applicants, that determination to be made based upon reference to the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed. Reg. 38290, 28 C.F.R. Sec. 50.14 (1978). (paragraph five). Intervenors aver that there is absolutely no appropriate statistical evidentiary data recited or contained in the August 18, 1981, consent decree to support or justify the limitation that selections shall be made in rank order for a Corporal only if the selection procedure has little or no adverse impact against black applicants.

6. The August 18, 1981, consent decree permitted Defendants to utilize the Corporal promotional procedure outlined therein but mandated that the results be reviewed

by reference to the Uniform Guidelines cited above, to determine whether they had an adverse impact against black applicants prior to the Department being allowed to make any promotions. The decree dictated that if the new procedure had an adverse impact upon blacks then promotion shall be made in a manner that does not result in adverse impact on the initial group of promotions or cumulatively during the use of the procedure, that the Defendant shall submit to Plaintiffs a proposal for making promotions in conformity with the February 16, 1979, partial consent decree and with the August 18, 1981, decree and that if the parties do not agree on a method for making promotions, the matter shall be submitted to the Court for resolution. (paragraph six) Intervenors aver that the decree cites or refers to no appropriate statistical information or statistical evidentiary support to justify the limitation of, "little or no adverse impact upon blacks" before promotions to Corporal could be made by the Alabama Department of Public Safety. Intervenors further aver that the decree cites or refers to absolutely no appropriate statistical evidentiary support, or finding or information to justify the use of the Uniform Guidelines referred to above and the answer to question 12 of the *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996, March 2, 1979, in determining adverse impact.

7. Intervenors aver that there is no appropriate statistical evidentiary support cited or referred to in the decree which supports or justifies the provisions of paragraph seven thereof and further aver that they have an interest, for themselves and the class they represent as those eligible for promotion to Corporal pursuant to the test conducted and given as outlined in the August 18, 1981, consent decree, to conduct discovery and proffer to the Court statistical evidence concerning any modifica-

tions on the existing selection procedure, on the use of the existing selection procedure for future administrations, to aid the Court in resolving this matter, or to demonstrate that the provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree relating to Corporal promotion are unreasonable, unconstitutional, illegal or against public policy.

8. Intervenors aver that the Corporal Promotional Examination which was given subsequent to the consent decree entered in this cause on August 18, 1981, was conducted, administered, graded and analyzed in a racially neutral and non-discriminatory manner without any consideration or regard to race and that the said examination was given and conducted under these conditions to all those eligible applicants for the same, whether those applicants were white or black.

9. Intervenors aver that they are governed and covered by the provisions of Code of Alabama 1975, § 36-26-1, *et seq.*, also known as the Merit System Act, and any rules or regulations promulgated thereunder, which relate to or concern promotions and further aver that those statutes and rules grant upon them a vested right to be promoted to Corporal in the same manner as those previously promoted to that position and without any regard or influence based on race but rather on merit and competition. See Code of Alabama 1975, § 36-26-23.

10. Intervenors aver that they are innocent of any wrongdoing nor did they participate in any of the activities or practices which necessitated the granting of any orders or decrees in this cause and are innocent victims whose career aspirations and expectations should not be blemished or impeded because of their race.

11. Intervenors aver that there are other detailed provisions of the orders and decrees entered in this cause which reach the objectives of the Plaintiffs' claims for relief.

12. Intervenors aver that the partial consent decree of February 16, 1979, and the consent decree of August 18, 1981, as they relate to promotion generally and to Corporal promotion specifically, including but not limited to those provisions which require that any selection procedure for Corporal promotion utilized have little or no adverse impact against black applicants, this determination to be made by reference to the *Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996 28 C.F.R Sec. 5014 and the answer to question 12 of the Questions and Answers to Clarify and Provide a Common Interpretation of the *Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996, March 2, 1979, as well as the relief sought in Plaintiffs' Motion to Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree, amount to hiring and promotional quotas and affirmative action plans or procedures for promotion which have the effect of reverse racial discrimination on the Intervenors and their class in violation of the Fourteenth Amendment to the Constitution of the United States, which violates their rights guaranteed by 42 USC § 1981 and § 1983 in that, *inter alia* they deprive them of the full and equal benefit of all laws free of racial discrimination or which are unreasonable, unconstitutional, illegal or against public policy.

FIRST CAUSE OF ACTION

13. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, impede, impair, contradict, conflict with, limit, abbrogate or otherwise interfere with the provisions of Code of Alabama 1975, § 36-26-1, *et*

seq., also known as the Merit System Act, and any rules or regulations promulgated thereunder, relating to or concerning promotions and are therefore unreasonable, illegal, unconstitutional or against public policy.

SECOND CAUSE OF ACTION

14. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, are unreasonable, illegal, unconstitutional or against public policy.

THIRD CAUSE OF ACTION

15. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, unnecessarily trammel the interest of the Intervenors and the class they represent and are therefore unreasonable, illegal, unconstitutional or against public policy.

FOURTH CAUSE OF ACTION

16. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, amount to unlawful reverse racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States and the violation of rights guaranteed to the Intervenors and

the class they represent by 42 USC § 1983 in that the Defendants have now and at all materia! times hereto acted under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Alabama in relation to the carrying out of the terms and provisions of the consent decrees referred to above.

FIFTH CAUSE OF ACTION

17. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, violate the rights guaranteed to the Intervenors and the class they represent by 42 USC § 1981 in that they have been deprived of the full and equal benefit of all laws in relation to the provisions and terms of the decrees and motions referred to above and in relation to promotion free of racial discrimination or without regard to race.

SIXTH CAUSE OF ACTION

18. That the terms and provisions of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, are unreasonable, unconstitutional, illegal or against public policy in that the decrees neither recite not contain any appropriate statistical evidentiary support concerning the number of black troopers eligible for promotion to Corporal or concerning the requirement of little or no adverse impact against blacks before there can be promotion in rank order, in that the various orders and consent decrees entered in this

cause contain detailed provisions which reach the objectives of the Plaintiffs' claims for relief and/or in that the provisions and terms of the February 16, 1979, partial consent decree, the August 18, 1981, consent decree and the Plaintiffs' motion of April 7, 1983, have a harsh impact on innocent third parties who, despite merit, suffer from the blemish of race.

SEVENTH CAUSE OF ACTION

19. That the terms and provisions of the February 17, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, are unreasonable, illegal, unconstitutional or against public policy in that they substantially interfere and effect a protectable interest of the Intervenors and the class they represent, to-wit: the right to compete for the benefits of public employment on the basis of individual worth and accomplishment, fairly ascertained, without the influence of irrelevant factors such as race.

EIGHTH CAUSE OF ACTION

20. That the terms and provisions of the February 17, 1979, partial consent decree and the August 18, 1981, consent decree as they relate generally to promotion and specifically to Corporal promotion, as well as the relief sought by the Plaintiffs in their motion of April 7, 1983, which is referred to above, are unreasonable, illegal, unconstitutional or against public policy in that they severely impair the career aspiration and promotional expectations of the Intervenors and the class they represent.

21. There is between the parties an actual controversy as set forth herein. The Intervenors and the class they represent have suffered and will continue irreparable injury and damage by reason of the acts and the provisions of the consent decrees and motion complained of herein. Intervenors and the class they represent have no plain, adequate or complete remedy to address the wrongs, unlawful acts, and the terms and provisions of the consent decrees and motions complained of herein other than this action for a declaration of rights and appropriate equitable relief. Any remedy to which Intervenors and the class they represent could be remitted would be attended with such uncertainties and delays as to deny substantial relief, and would involve multiplicity of suits causing further irreparable injury, damage and inconvenience.

WHEREFORE, Intervenors, on behalf of themselves and all others similarly situated, respectfully pray that this Court will take jurisdiction of this cause and do the following:

A. Certify this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

B. Following a hearing on this complaint, issue a preliminary injunction, to be made permanent later, enjoining the Defendants or any other party from promoting any individual to the rank of Corporal pursuant to the terms and provisions of the partial consent decree of February 16, 1979, the consent decree of August 18, 1981, or pursuant to the Plaintiffs' Motion To Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree.

C. Declare the terms and provisions of the partial consent decree of February 16, 1979, the consent decree of August 18, 1981, or pursuant to the Plaintiffs' Motion to Enforce The Terms Of The February 16, 1979, Partial Consent Decree And The August 18, 1981, Consent Decree to be unreasonable, illegal, unconstitutional or against public policy.

D. Enter an order which ensures that any future or further promotion of any individual employed by the Alabama Department of Public Safety to the rank of Corporal be accomplished without infringing upon the Intervenors' or the class they represent constitutional rights, including but not limited to, those guaranteed by the Fourteenth Amendment to the United States Constitution or infringing upon their rights guaranteed to them by 42 USC § 1981 and § 1983.

E. Grant and award Intervenors their costs and reasonable attorneys' fees and expenses.

F. Award Intervenors all other, different and further relief to which they are entitled.

Respectfully submitted

Stuart & Ward

/s/ JAMES S. WARD

James S. Ward
Attorney for Intervenors

OF COUNSEL
Stuart & Wood
1933 Montgomery Highway Suite 200
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939-0276

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF
ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

JERRY SHOEMAKER, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

ORDER

Upon consideration of (i) the defendants' April 21, 1983, motion for extension of time, (ii) the applicants for intervention's April 26, 1983, motion for evidentiary hearing or in the alternative for oral argument, and (iii) the United States of America's April 29, 1983, motion for extension of time, it is ORDERED:

(1) That the April 21, 26 and 29 motions be and they are hereby granted to the extent

(a) That the submission of the April 7, 1983, motion to enforce consent decree and the submission of the April 15, 1983, motion to intervene be and they are hereby continued to May 27, 1983;

(b) That the parties and movants for intervention are allowed until May 6, 1983, to file any responses or briefs in connection with the April 7 and 15 motions; and

(c) That the April 7 and 15 motions be and they are hereby set for oral argument on May 27, 1983, at 10:00 a.m. in the fourth floor courtroom of the federal courthouse in Montgomery, Alabama; and

(2) That the April 21, 26, and 29 motions be and they are hereby denied in all other respects.

DONE, this the 3rd day of May, 1983.

[SIGNATURE]

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

ORDER

Upon consideration of the April 15, 1983, motion to intervene, filed by V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport, four white troopers with the Alabama Department of Public Safety; and for good cause, it is ORDERED that the motion be and it is hereby granted to the extent that the movants may participate in these proceedings on a prospective basis only and may not challenge previously entered orders, judgments, and decrees since intervention is untimely as to these; and that the motion be and it is hereby denied in all other respects. *United States v. California Cooperative Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424 (1929); *Smith v. Missouri Pac. R. Co.*, 615 F.2d 683 (5th Cir. 1980). *See Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3635 (U.S. February 16, 1983) (No. 82-1390). *See also* 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 24.16[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1920.

DONE, this the 28th day of October, 1983.

[SIGNATURE]
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS.

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

ORDER

This cause is now before the court on the plaintiffs' April 7, 1983, motion to enforce the terms of two previously entered consent decrees. A hearing was held on the motion on May 27, 1983. For reasons which follow, the plaintiffs are entitled to relief.

I.

On February 10, 1972, the court found that the defendant officials of the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discrimination in hiring . . . as to troopers." *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D.Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). The court ordered the defendants to hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." 340 F. Supp. at 706.

On February 16, 1979, a partial consent decree was approved and entered by the court, following a reopening of the case by the plaintiffs. This decree required, among other things, that the defendants institute

> a promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedure*, 43 Fed. Reg. 38290, [28 C.F.R. 50.14,] and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

On August 18, 1981, another consent decree was approved and entered by the court in response to the defendants' request that the court approve their newly developed selection procedure, which included a written examination component. The plaintiffs and the United States had objected to the selection procedure on the ground that it failed to comply with the Uniform Guidelines, as required by the 1979 decree. The 1981 decree provided in relevant part as follows:

> 5. If the selection procedure has little or no adverse impact against black applicants, selections shall be made in rank order. . . . Whether or not the selection procedure has "little or no adverse impact" will be measured by the "four-fifths rule" set forth in Section 4 D of the *Uniform Guidelines, supra*. If the parties cannot agree whether the selection procedure has an adverse impact, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made pending resolution of the question of adverse impact.
>
> 6. If the parties agree, or the Court finds, that the selection procedure has an adverse impact, promotions shall be made in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure. Defendants shall submit to plaintiffs their proposal for making

promotions in conformity with the Partial Consent Decree and with this Decree. If the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made until the parties have agreed in writing or the Court has ruled upon the method to be used for making promotions with little or no adverse impact.

7. If the selection procedure has an adverse impact against blacks seeking promotion to corporal, defendants shall examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and shall revise the procedure so as to avoid adverse impact in the future. Defendants shall provide plaintiffs with data showing the impact of each component of the selection procedure and item-by-item analysis of the impact of the written test. The parties shall attempt to agree upon modifications in the selection procedure for future administrations. If the parties are unable to agree upon the procedure to be used after the first administration of the selection procedure and the method of using that procedure, the matter shall be submitted to the Court for resolution.

After the 1981 decree was approved and entered, the defendants administered the selection procedure to all applicants seeking promotion to corporal. The procedure was administered to 262 persons—202 (77.1%) white persons and 60 (22.9%) black persons. The highest ranked black persons,[1] based on the selection procedure, holds the 80th place on the list of rankings.

There is no dispute among the parties that the defendants need additional corporals and that they need at least 15 of them as soon as possible. The plaintiffs and the

[1] This number includes one trooper, James Cox, whose race is identified as "other."

United States contend that the selection procedure has an adverse impact and, in accordance with the 1981 decree, may not be used by the defendants. The defendants contend that the procedure does not have an adverse impact and may be used.

By another order entered this date the court has allowed four white employees of the Alabama Department of Public Safety to intervene as defendant-intervenors. Their intervention is on a prospective basis only; they are not allowed to challenge prior orders, judgments, and decrees of the court.

II.

Since the parties have been unable to agree on whether the selection procedure has an impermissible adverse racial impact, the court in accordance with the 1981 decree must now make that determination. To determine whether the selection procedure has an adverse impact, the decree refers to the four-fifths rule set forth in section 4 D of the Uniform Guidelines, which provides in relevant part:

> *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Applying the four-fifths rule and assuming fifteen candidates are to be promoted in rank order based on the selection procedure results, the success rate for white persons would be 15/202 or 7.4%, and the success rate for black persons would be 0/60 or 0%. Zero is, of course, less than four-fifths of 7.4. Indeed, even if seventy-nine corporals were promoted in rank order, none would be black. Short

of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact.

Also relying on section 4 D, the defendants contend that their selection procedure nonetheless does not have an adverse impact. The portion of the section relied upon provides as follows:

> Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

The defendants contend that the one-to-one hiring ratio for state troopers is a "special program" which has resulted in an atypical pool because black troopers scored lower on a "hiring test" than did white troopers. The defendants contend that the court should afford them an opportunity to show this. The court agrees with the position of the United States and the plaintiffs that a hearing is unnecessary. Accepting the defendants' anticipated evidence as true, this court must nonetheless conclude that the evidence is an unacceptable basis to rest a claim of atypicality. The hiring test, to which the defendants wish to link their promotion procedure, has not been subjected to an adverse impact determination, nor has it been validated.[2]

For the above reasons, the court concludes that the selection procedure has an adverse impact against black candidates. *United States* v. *City of Montgomery,* 19 E.P.D. ¶ 9239, pp. 7412-15 (M.D.Ala. 1979).

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[2] The defendants do not contend that the candidate pool in some way distorts the labor market to the advantage of the plaintiffs.

III.

Since the defendants' selection procedure has an adverse impact on black candidates for the position of corporal, the 1981 decree prohibits the defendants' use of the procedure. Furthermore, the defendants are now required by the decree to fashion and submit to the court a proposal to promote to corporal, from among qualified candidates, at least 15 persons in a manner which which will not have adverse impact. And if the plaintiffs, the United States, and the defendants cannot agree to a promotion plan, they are required by the decree to submit the matter to the court for resolution.

As already noted, this lawsuit is now before the court on the plaintiffs' motion to enforce the terms of two previously entered decrees. The court will grant the plaintiffs' motion to enforce to the extent the motion seeks compliance with the immediately preceding requirements in the 1981 decree. An appropriate order will be entered declaring that the selection procedure has an adverse racial impact and may not be used by the defendants; requiring that the defendants submit an appropriate proposal for the needed promotions; and setting a deadline for submission of the matter to the court if the plaintiffs, the United States, and the defendants are unable to agree upon a promotion plan. If the plaintiffs, the United States, and the defendants should agree to a promotion plan, the plaintiff-intervenors will be allowed an opportunity to file responses and objections to the plan.

Also, as a result of the finding of adverse impact, the defendants are required by the 1981 decree to "examine the results of each component of the selection procedure to identify the sources of the adverse impact," to "revise the procedure so as to avoid adverse impact in the future," to "provide plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test," and, if the par-

ties cannot agree upon modifications to cure the adverse impact, to petition the court to resolve the disputed matters. It does not appear, however, that the plaintiffs—who are the movants at this stage of the proceedings—are seeking enforcement of this part of the 1981 decree, and the court will therefore not enter an order compelling enforcement.[3]

Accordingly, for the above reasons, it is ORDERED:

(1) That the plaintiffs' April 7, 1983, motion to enforce the terms of the February 16, 1979, partial consent decree and the August 18, 1981, consent decree, be and it is hereby granted to the extent hereafter set forth;

(2) That it is hereby declared that the defendants' selection procedure for promotion to corporal has an adverse racial impact and that said selection procedure may not be used by the defendants for promotion purposes;

(3) That on or before November 10, 1983, the defendants shall file with the court a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact;

(4) That on or before November 18, 1983, the plaintiffs, the United States, and the defendant-intervenors may file any objections and counter-proposals;

(5) That, if by November 25, 1983, the plaintiffs, the United States, and the defendants have not filed a promotion plan agreed to by all said parties, the issue of corporal promotions shall be deemed submitted for resolution by the court; and

(6) That, if the plaintiffs, the United States, and the defendants file an agreed-to promotion plan, the defend-

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[3] However, if the plaintiffs are seeking enforcement of the part of the 1981 decree regarding modifications of the selection procedure, then the plaintiffs should file a pleading so indicating.

Also, if the defendants desire to invoke this part of the decree then they need only carry out their responsibilities under this part and, if the parties are unable to agree upon the modifications, petition the court to resolve the matter.

ant-intervenors are allowed seven days from the date of filing to file any responses and objections to the plan.

DONE, this the 28th day of October, 1983.

[Signature]

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

PROPOSED PROMOTION PROCEDURE

This cause is now before the Court on the Court's October 28, 1983 Order which provided that "the defendants shall file with the Court a plan to promote to Corporal, from qualified candidates, at least fifteen (15) persons in a manner that will not have an adverse racial impact". Pursuant to the Order, this defendant submits to the Court herewith a proposal for making promotions to Corporal within the Department of Public Safety. The defendant, the Department of Public Safety, proposes to make promotions to Corporal as follows:

1. The defendant, the Department of Public Safety, proposes to promote to Corporal fifteen (15) troopers. Of these fifteen (15) individuals promoted, the defendant proposes to promote eleven (11) whites and four (4) blacks, on a one time basis only. In support of this proposal, the defendant would say:

(a) That by promoting four (4) blacks and eleven (11) whites the requirements of the four-fifths rule of the Uni-

form *Guidelines* concerning adverse impact is met;

(b) That this percentage of blacks to whites reflects the percentage of blacks to whites who took the Corporal's examination;

(c) That there is an immediate need for at least fifteen (15) Corporals to be promoted within the Department of Public Safety; and,

(d) That this procedure should only be used for this initial group of promotions.

(e) That this defendant, while it does not waive any objections previously made, proposes that the selections will be made from the current Corporal Promotion List, in rank order, utilizing the "rule of three" as provided in the Alabama Merit System Law. The promotion of black candidates will necessarily be made by consideration of black candidates in the order in which they appear on the current promotional register.

(f) The Department of Public Safety does not agree that this method is an appropriate method for promotion of candidates based on merit and request the Court to enter an Order permitting the Department of Personnel of the State of Alabama to develop a procedure for promoting Troopers to Corporals in a nondiscriminatory manner for use in subsequent promotions. Said procedure to be submitted to the Court for *prior* approval within a specified time period. The defedant, Department of Public Safety, will cooperate with the Department of Personnel in developing such a promotional procedure in order that such be accomplished as soon as possible.

Respectfully submitted,

By: EDWARD L. HARDIN, JR.

Edward L. Hardin, Jr.,
Special Assistant Attorney
General for Alabama Department of Public Safety

OF COUNSEL:
Edward L. Hardin, Jr.
Hardin & Hollis
1825 Morris Avenue
Birmingham, Alabama 35203
Telephone: (205) 328-2675

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Proposed Promotion Procedure has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed on this the 10th day of November, 1983.

/s/ EDWARD L. HARDIN, JR.
Edward L. Hardin, Jr.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 2561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

ORDER

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the plaintiffs' April 7, 1983, motion to enforce the terms of the February 16, 1979, partial consent decree and August 18, 1981, consent decree, be and it is hereby granted to the extent hereafter set forth;

(2) That the defendants and their agents and employees be and each is hereby enjoined and restrained from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank;

(3) That this promotion requirement shall remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the defendants have developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal requirements;

(4) That within 35 days from the date of this order the defendants shall submit to the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position;

(5) That the plaintiffs be and they are hereby allowed 21 days from this date to file a request for interim attorney fees, which request shall be supported by affidavits and shall address each of the criteria set forth in *Hensley* v. *Eckerhart*, __ U.S. __, 103 S.Ct. 1933 (1983), and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); and

(6) That all other relief requested by the plaintiffs in their motion and not specifically granted be and it is hereby denied.

DONE, this the 15th day of December, 1983.

[SIGNATURE]

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

MEMORANDUM OPINION

The present phase of the proc edings in this lawsuit began on April 7, 1983, when the plaintiffs filed a motion to enforce the terms of two previously entered consent decrees. In accordance with these decrees and as a result of recent developments, this court must determine what procedure the Alabama Department of Public Safety must use in promoting troopers. The court understands that the department is in need of at least 15 new corporals immediately.

I.

In 1972, then Chief District Judge Frank M. Johnson, Jr., remarked in this case that "[i]n the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers." *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972). The court found

that the department had "engaged in a blatant and continuous pattern and practice of discrimination in hiring . . . both as to troopers and supporting personnel;" and the court ordered that the department hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." *Id.* at 705, 706. The order was affirmed on appeal. 493 F.2d 614 (5th Cir. 1974).

In a later proceeding in this case, Judge Johnson was asked to clarify "whether the twenty-five percent hiring quota applies to the entire state trooper force or just to entry-level troopers." *Paradise* v. *Shoemaker,* 470 F. Supp. 439, 440 (M.D. Ala. 1979). The court responded that "there is no ambiguity" and that the twenty-five percent quota applies "to the entire force of sworn officers, not just to those in the entry-level rank." *Id.* at 440-41. The court observed that the defendants were guilty of discrimination not just in hiring, but in all ranks of the patrol. The court then emphasized that,

> One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black.* The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest.

Id. at 442 (emphasis in original).

On February 16, 1979, the parties entered into a consent decree which required that the department develop and implement a valid promotion procedure for the rank of corporal. The decree gave the department a year to meet this objective, after which the department was to do the same, in turn, for the ranks of sergeant, lieutenant, captain and major. This time schedule was not met, and on

August 18, 1981, the parties entered into another consent decree which allowed the department to administer a newly developed promotion procedure for the rank of corporal, but prohibited any promotions under the procedure until it had been first determined that the procedure had "little or no adverse impact against black applicants." According to the decree, adverse impact was to be determined and measured by the "four-fifths rule" set forth in Section 4 D of the Uniform Guidelines of Employee Selection Procedures, 28 C.F.R. § 50.14 (1983).

On April 7, 1983, the plaintiffs filed a motion seeking enforcement of the 1979 and 1981 consent decrees and, in particular, a determination whether the department's promotion procedure for corporal had an adverse racial impact. The department needed at least 15 new corporals, and the parties were unable to agree whether the procedures developed in 1981 could be used for the promotions. On October 28, 1983, the court found that the procedure did have an adverse racial impact on black applicants and, in accordance with the 1981 consent decree, prohibited use of the procedure.

The parties have been unable to agree upon another selection procedure for the 15 needed corporals; and, as required by the 1981 consent decree, they have requested that the court fashion a procedure.

II.

On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants,

there is still not one black. And of the 66 corporals, *only four are black.* Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

In light of the severe racial imbalances in the upper ranks, the court agrees with the plaintiffs that for a period of time at least 50% of all those promoted to corporal and above must be black troopers, as long as there are qualified black troopers available.[1] The court also agrees with the plaintiffs that if there is to be within the near future an orderly path for black troopers to enter the upper ranks, any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures for all ranks. The court will therefore enter an order requiring that, for each white trooper promoted to a higher rank, the department shall promote one black trooper to the same rank, if there is a black trooper objectively qualified for the promotion. This requirement shall remain in effect as to each rank above entry level until either 25% of the rank is black or the department has developed and implemented for the rank a promotion procedure which meets the requirements of the prior orders

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[1] In light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances, a credible argument could be made that all 15 of the new corporals should be black, followed perhaps by a one-to-one ratio. However, the plaintiffs are not seeking this relief.

and decrees of this court and all other relevant legal requirements.[2] The court will also require that the department submit to the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position. The schedule should be based upon realistic expectations.

III.

The relief fashioned by the court today is warranted by law. Where there has been unlawful discrimination, a district court has not only the power but the responsibility to fashion a remedy that will as much as possible eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1972). As the evidence in the present case dramatically demonstrates, these effects will not wither away of their own accord. Furthermore, in fashioning relief, a court should include race-conscious requirements if they are necessary, reasonable, and otherwise appropriate under the circumstances.[3] *United States* v. *City of Miami,* 664 F.2d 435 (5th Cir. Dec. 3, 1981) (en banc) (former Fifth Circuit); *United States* v. *City of Alexandria,* 614 F.2d 1358 (5th Cir. 1980).

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[2] According to the *1980 Census of Population* published by the U.S. Department of Commerce, the State of Alabama is approximately 26% black. In *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 340 n. 20, 97 S.Ct. 1843, 1857 n.20 (1977), the Supreme Court stated that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

[3] In an earlier order this court demonstrated dramatically the efficacy of quotas, over other remedies, in instances where blacks have historically been completely excluded or almost completely excluded from employment. *NAACP* v. *Dothard,* 373 F. Supp. 504 (M.D.Ala. 1974) (Johnson, C.J.)

The promotional quotas imposed by the court today are clearly necessary. The racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration; and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future.

The promotional quotas are also reasonable. They are specifically tailored to redress the continuing effects of past discrimination, but they do "not unnecessarily trammel the interest of white employees." [4] *United Steelworkers* v. *Weber,* 443 U.S. 193, 208-09, 99 S.Ct. 2721, 2730 (1979). They do not require the discharge or demotion of a white trooper or his replacement with a black trooper; nor do they create an absolute bar to the advancement of white troopers. Moreover, the quotas are but a temporary measure, designed not to maintain a racial balance, but simply to eliminate a manifest and chronic racial imbalance. Finally, only qualified black troopers will be considered for promotion under the quotas. *See, e.g., United Steelworkers* v. *Weber, supra; United States* v. *City of Miami, supra; United States* v. *City of Alexandria, supra.*

The quotas imposed by the court are also not without legal precedent. In *United States* v. *City of Alexandria, supra,* the former Fifth Circuit approved a consent decree

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[4] The court has allowed four white troopers to intervene as defendant-intervenors. Their intervention is on a prospective basis only; they are not allowed to challenge prior orders, judgments, and decrees of the court. *United States* v. *California Co-operative Canneries,* 279 U.S. 553, 556, 49 S.Ct. 423, 424 (1929); *Smith* v. *Missouri Pac. R. Co.,* 615 F.2d 683 (5th Cir.1980). *See Thaggard* v. *City of Jackson,* 687 F.2d 66, 68 (5th Cir. 1982), *cert. denied sub nom. Ashley* v. *City of Jackson,* __ U.S. __, 104 S.Ct. 255 (1983). *See also* 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 24.16 [5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1920.

imposing on a municipality promotional quotas ranging from 25 to 50%. Under the decree, the quotas are to remain in effect until the municipality achieves the same percentages of blacks and women as are in the overall work force in the affected localities. *See also, e.g., E.E.O.C.* v. *American Telephone and Telegraph Company,* 556 F.2d 167 (3rd Cir. 1977), *cert. denied,* 439 U.S. 915, 98 S.Ct. 3145 (1978).

Two factors in the present case make the claim for promotional quotas even stronger than it was in *City of Alexandria.* In contrast to the earlier case, here the court has made a specific finding of long-term, open and pervasive racial discrimination. Moreover, this court has before it a record demonstrating that without promotional quotas the continuing effects of this discrimination cannot be eliminated. Nevertheless, the quotas imposed by this court are substantially less constraining than those imposed in *City of Alexandria.* Under the order this court will enter today, the Alabama Department of Public Safety has the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures. It is thus possible for the use of the quotas to be a one-time occurrence.

IV.

Finally, as this lawsuit moves into its twelfth year, it is clear that the court and the parties should now contemplate bringing this litigation to an end. The court therefore hopes that, in addition to achieving the above objectives, the remedy imposed today will hasten the day when the Alabama Department of Public Safety is no longer under the supervision of this court.

An appropriate order will be entered in accordance with this memorandum opinion.

DONE, This the 15th day of December, 1983.

[SIGNATURE]

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

ORDER

The court now has before it several motions seeking reconsideration or, in the alternative, a stay pending appeal of the court's December 15, 1983, order imposing a temporary promotional quota on the Alabama Department of Public Safety. A hearing was held on the motions on January 5, 1984.*

Since the opinion accompanying the December 15 order addressed in detail most of the issues raised by the motions, the court will now address only those issues not addressed earlier or in need of further explanation.

Of particular concern to the court is the department's new contention that it "is without legal authority and sufficiently trained personnel to design any promotional procedures." The Department of Public Safety now maintains that this "function is allocated by statute to the Depart-

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* Although some motions were not filed until January 6, they were argued on January 5. At the January 5 hearing the court was informed that the additional motions were forthcoming.

ment of Personnel of the State of Alabama." In 1979 and 1981, the Public Safety Department entered into consent decrees providing for advancement of black troopers into the upper ranks of the patrol. The decrees require the department to fashion acceptable promotion procedures. The department's counsel acknowledged at the January 5 hearing that it was anticipated that development of these procedures would take only a few months. It is now years later and this court will not entertain the excuse that the department is now without legal authority to meet its obligations under the consent decrees. The department entered into the consent decrees and now has no right to refute those decrees. Moreover, the Department of Personnel, which is also a party to these proceedings, assured the court at the January 5 hearing that it would work closely with the Public Safety Department to develop acceptable promotion procedures. The Public Safety Department's contention that it is without legal authority is not only meritless, it is frivolous.

Moreover, that the Department of Public Safety would even advance this argument dramatically demonstrates the need for the relief imposed by this court. Such frivolous arguments serve no purpose other than to prolong the discriminatory effects of the department's 37-year history of racial discrimination. As the court stated in its December 15 opinion,

> the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

The Public Safety Department also seeks clarification of the words "qualified black trooper" in the court's Decem-

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ber 15 opinion and order. Counsel for the department stated at the January 5 hearing that while he thought he understood what the court meant, he was not certain. The court sees no need for clarification at this time. The proper procedure for the department and its counsel is to submit to opposing counsel their understanding of the words. Unless the parties differ on the meaning of the words, there is no need to clarify them.

Furthermore, the court sees no need to stay its December 15 order. All parties, except defendant-intervenors, agree that at least 4 of the 15 new corporals must be black. The December 15 order requires that 7 or 8 be black. Thus, the immediate impact of the order is to increase the number of black corporals by 3 or 4. These promotions come after almost half a century in which blacks have been unable to enter the upper ranks of the troopers: For 37 years the department operated under a regime of racism which totally excluded blacks from all ranks in the patrol; and for the last 12 years there have been no acceptable promotion procedures by which blacks could advance in the patrol. In light of this history, the 7 or 8 black troopers promoted as a result of the December 15 order are, if anything, far from enough; and to decrease this number now would be nothing less than a "blow upon a wound."

Moreover, the equities, when balanced, favor keeping in place the temporary promotional quota imposed by the court. Black persons waited almost half a century to get the 7 or 8 promotions required by the December 15 order. Surely, those dissatisfied with the relief can wait the few months needed for appellate review. And should the appellate court find the relief imposed by this court is inappropriate, adjustments can be made in future promotions to correct the effects of this court's relief.

Finally and perhaps most significantly, it appears likely that the temporary promotional quota will not extend beyond the present 15 promotions. At the January 5 hearing,

the Personnel Department pledged that it would *now* devote its full resources to assisting the Public Safety Department in not only developing acceptable promotion procedures as required by the consent decrees, but in doing so within the near future. If these two departments hold fast to this promise, the temporary promotional quota should be, as this court hoped and expressed in the December 15 opinion, "a one-time occurrence." It thus appears that the December 15 order will have an effect which will please *all* parties: the development of acceptable promotion procedures and the mooting of the temporary promotional quota. This is not the time to stay the order.

Accordingly, it is ORDERED that the following motions be and they are hereby denied: defendant-intervenors' January 6, 1984, motion to stay; the United State's January 6, 1984, motion to stay; defendant Prescott, et al.'s December 27, 1983, motion to alter or amend judgment and stay of order; defendant Alabama Personnel Director's December 27, 1983, motion for reconsideration; defendant-intervenors' December 27 and 30, 1984, motions to alter or amend and to stay enforcement; and the United State's December 23, 1983, motion to alter or amend judgment.

DONE, this the 13th day of January, 1984.

[SIGNATURE]

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

STATEMENT OF COMPLETION OF PROCEDURE FOR PROMOTION TO RANK OF CORPORAL

Comes now Byron Prescott, Director of the Alabama Department of Public Safety, by and through his attorney of record and states to this Honorable Court as follows:

(1) that the procedure designed for use in selecting candidates for promotion to the rank of Corporal has been completed;

(2) that the procedure has been implemented;

(3) that a final ranking of candidates eligible for promotion has been completed; and

(4) that the selection procedure conforms with the applicable statutes and Orders entered in this case.

As a result of this procedure, thirteen (13) persons have been certified as "best qualified" for promotion to Corporal. From this number, the Director will select the per-

sons to be promoted as the need for Corporals arises, if the procedure is approved for use by this Court.

Respectfully submitted,

HARDIN & HOLLIS

/s/ EDWARD L. HARDIN, JR.

Edward L. Hardin, Jr.,
Of Counsel for Defendants

OF COUNSEL:
Edward L. Hardin, Jr.
Hardin & Hollis
Post Office Box 11328
Birmingham, Alabama 35202-1328
Telephone: (205) 328-2675

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion has been served upon all counsel of record, as below listed, by placing a copy of same in the United States mail, postage prepaid and properly addressed on this the 18th day of June, 1984:

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EDWARD L. HARDIN, JR.

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

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V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

MOTION TO APPROVE SELECTION PROCEDURE FOR PROMOTION TO CORPORAL

Comes now Byron Prescott, as Director, Alabama Department of Public Safety, and moves this Honorable Court for an Order approving the procedure designed for use in selecting persons best qualified for promotion from the rank of State Trooper to Corporal and to authorize the Director of the Department to promote persons from the list of persons ranked "best qualified" to the rank of Corporal as the need arises.

Counsel for this Defendant has kept counsel for the Plaintiffs generally informed of the procedure used and will furnish counsel any additional information requested upon receipt of ~~an~~ Order from this Court that all confidential information not be disclosed to any other person unless specifically approved by the Court.

Counsel for this Defendant requests that the Court order all hearings held in connection with this motion be confidential in order to protect the validity of the selection procedure utilized. If confidentiality is not maintained,

certain aspects of the procedure could not be used in the future.

Respectfully submitted,
HARDIN & HOLLIS
/s/ EDWARD L. HARDIN, JR.
Edward L. Hardin, Jr.,
Of Counsel for Defendants

OF COUNSEL:
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/s/ EDWARD L. HARDIN, JR.
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

RESPONSE TO DEFENDANT PRESCOTT'S MOTION TO APPROVE SELECTION PROCEDURE FOR PROMOTION TO CORPORAL

Come now the defendant-intervenors in the above styled cause, by and through their attorney of record, and pursuant to this Court's Order of June 21, 1984, submit the following as their response to defendant Prescott's Motion to Approve Selection Procedure for Promotion to Corporal:

1. While defendant Prescott may have kept counsel for the plaintiffs generally informed of the procedure used for promotion for corporal, the intervenors have been told nothing, they have been informed of nothing and have not in any way been privy to the procedure used. Consequently, without being allowed to conduct some discovery or to be fully informed of the procedure utilized, the intervenors are not in a position to assert whether they approve of the promotion system to be utilized.

2. Without being informed of or having the knowledge

of the procedure utilized for promotion to corporal, the intervenors would object to any promotions which are based on any factor other than merit and would object to any promotion system which in any way violates the rights guaranteed to them by state or federal law or by the United States Constitution. Further, intervenors would object to any selection procedure for promotion to corporal which benefits, to the detriment of the intervenors, persons who have not shown to be actual victims of discrimination in promotion. Defendant-intervenors further object to the utilization of any selection procedure for promotion to corporal or for an Order approving the same which goes beyond the remedial authority and policy of § 706(g) of Title VII as recently expressed by the United States Supreme Court in *Memphis Fire Department, et al.*, v. *Stotts,* 52 U.S.L.W. 4767, 4771-4773 (June 12, 1984).

3. The consent decrees previously entered in this cause were done so when the defendant-intervenors were not parties to this litigation, yet those decrees substantially affect their rights to employment and career aspirations. The consent decrees previously entered in this cause also impose a racial quota or preference in any promotional scheme to corporal. This is so because no matter how content valid, scrupulously fair or otherwise valid the corporal examination may be, rank order promotion will not be allowed if a finding of adverse impact against blacks is made, that finding to be determined by the utilization of the four-fifths rule. As a result, promotions will then be made by "awarding" to blacks, at the expense and to the detriment of the intervenors, who are either equally or better qualified, guaranteed promotions. This system of racial quota or preference in promotion, by the utilization of the four-fifths rule, ignores not only the content validity of any examination, but more importantly the now imperative requirement that any black afforded preferential treatment in promotion, be an actual victim or discrimina-

tion in promotion. See *Memphis Fire Department, et al.*, v. *Stotts,* 52 U.S.L.A. 4767 (June 12, 1984).

It then follows, based on *Stotts,* supra., that any corporal promotional scheme pursuant to the previously entered consent decrees which allows a black to be promoted over an equally or better qualified white, simply because he is black, without a showing that he was an actual victim of discrimination in promotion, violates the defendant-intervenors rights as guaranteed by state and federal law and the United States Constitution and goes beyond the remedial authority granted unto District Courts by § 706(g) of Title VII.

Consequenly, any corporal promotion or Orders allowing corporal promotion pursuant to the previously entered consent decrees which set aside guaranteed places for blacks or which allow blacks to be promoted over equally or better qualified whites, simply because that person was black, without any showing that that person was an actual victim of discrimination in promotion, is invalid. See *Memphis Fire Department, et al.*, v. *Stotts,* 52 U.S.L.W. 4767 (June 12, 1984).

Moreover, and as a result of *Stotts,* supra., the consent decrees must now be modified to allow promotions to corporal only in a manner that does not violate the rights of the defendant-intervenors and in a way which does not exceed the remedial authority granted unto District Courts by § 706(g) of Title VII or the policy behind the same as expressed in *Stotts,* supra.

4. Defendant-intervenors would object to any promotion until it can be determined that any promotional schemes would be in accordance with the principals set forth by the United States Supreme Court in *Memphis Fire Department, et al.*, v. *Stotts,* 52 U.S.L.W. 4767 (June 12, 1984) and request that the consent decrees previously entered, after discovery and hearing, be modified in accordance with that opinion.

5. For that defendant Prescott states that the selection procedure conforms with applicable statutes and Orders entered in this case. If by this it is meant that the procedure conforms with the previously entered consent decrees, defendant-intervenors object on the grounds heretofore stated.

Respectfully submitted,

Ward & McKnight

/s/ JAMES S. WARD

James S. Ward
Attorney for
defendant-intervenors
2100 16th Avenue South
Birmingham, Alabama 35205
(205) 933-7000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Response has been served upon all counsel of record, as below listed, by placing a copy of same in the United States mail, postage prepaid and properly addressed on this the 27th day of June, 1984:

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/s/ JAMES S. WARD

James S. Ward

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO APPROVE SELECTION PROCEDURE FOR PROMOTION TO CORPORAL

On June 18, 1984, defendants filed a Statement of Completion of Procedure for Promotion to Rank of Corporal, along with a Motion to Approve Selection Procedure for Promotion to Corporal. These pleadings were filed in compliance with a February, 1984 schedule for the development of promotion procedures, in which defendants agreed to develop a promotion procedure for the position of corporal within five months that would have little or no adverse impact on black promotion applicants.

Due to the confidential nature of the data involved here, defendants have requested an order from this court insuring confidentiality of any data they provide to plaintiffs, before they will release any of it to plaintiffs. Accordingly, plaintiffs hereby request any and all data in the possession of defendants that will enable plaintiffs to evaluate this new procedure, including but not limited to:

1. The rankings of promotional candidates, including appropriate racial designations;

2. A copy of the written examination that was administered, along with any relevant validation data;

3. A written description of the entire procedure;

4. The names, races and qualifications of the three persons who served as interviewer/panelists.

5. A list of the questions asked by the panelists during interviews, including all relevant validation data for each question;

6. Copies of any and all forms/records kept by panelists during interview sessions, or any other relevant documents reflecting written accounts of the individual evaluations given by the panel and individual panelists.

7. The name, address, and qualifications of the person(s) responsible for the development of this procedure, as well as copies of all written documents/reports authored by this person with respect to the procedure under review.

8. All documents, reports, etc. prepared by officials and/or agents of the defendants respecting this procedure, including but not limited to writings and data supplied to defendants' expert(s) and interview panelists and documents exchanged between Department officials/agents.

9. Copies of all written instructions given to defendants' expert(s) and interview panelists, as well as descriptions of any oral instructions.

10. A written description of how selections will be made from the list of 13 "best qualified" candidates, including a statement of any affirmative action commitment defendants will undertake in order to comply with the "little or no adverse impact on blacks" provisions of the 1979 and 1981 decrees.

11. Copies of any and all evaluations of the new test/procedure that were procured from applicants by defendants, including designations of the race of those mak-

ing such evaluations and a statement of the purpose for which these evaluations were procured.

12. Copies of any and all documents exchanged between the Department of Public Safety and the Department of Personnel regarding any and all of the matters listed above, as well as any documents exchanged between the Department of Personnel and defendants' expert(s) and interview panelists.

13. A statement of whether and, if so, how the rule of three will be followed in the selections of promotion candidates.

14. Any and all other written documents relevant to the implementation of defendants' new promotion procedure not specifically requested above, that are in the possession of the Alabama Department of Public Safety, the Department of Personnel, and/or any and all officials/agents of those Departments, or that were retained/commissioned by those Departments, with respect to this promotion procedure.

15. A projection of the life of this promotion list, as well as a description of the relevant factors which will determine its life.

16. A description of any and all supervisory training programs developed, and/or implemented by defendants to train troopers for entry into supervisory positions, including but not limited to the affirmative action goals which are involved and future plans for this or any other supervisory training programs.

17. A statement of reasons why the proposed procedure will have little or no adverse impact on black applicants for promotion, both under the present and future promotion lists.

Plaintiffs do not object to, and specifically agree to comply with, an appropriate order from the court protecting the confidentiality of the information described in paragraphs one through seventeen. Upon receipt of this information, plaintiffs will evaluate it with due speed and

file a supplemental written response to defendants' motion, addressing the issue of whether the new procedure meets the specific requirements of the 1979 and 1981 decrees and relevant legal requirements.

Respectfully submitted,

/s/ DENNIS N. BALSKE

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P.O. Box 2087
Montgomery, AL 36102-2087
205/264-0286
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon Ed Hardin, Rick Meadows, Cynthia Drabek, James S. Ward and John Bell, by U.S. First Class Mail, this 29th day of June, 1984.

/s/ DENNIS N. BALSKE

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE,

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS.

PLAINTIFFS' RESPONSE TO INTERVENORS' OBJECTION TO IMPLEMENTATION OF NEW PROMOTION PROCEDURE

On June 27, 1984, intervenors filed a Response to Defendants Motion to Approve Selection Procedure for Promotion to Corporal, in which they asserted, *inter alia,* that the 1979 and 1981 consent decrees would have to be modified in order to comply with the Supreme Court's recent decision respecting bona fide seniority systems. Plaintiffs submit that intervenors' assertion is meritless and should be rejected.

Plaintiffs this data have filed their brief in the Eleventh Circuit Court of Appeals supporting this Court's Order of December 15, 1984. Section IV of the brief addresses the limited effect of the Supreme Court's recent decision on the case *sub judice.* It conclusively demonstrates the invalidity of intervenors' instant contention.

Rather than repeat the discussion of the limited effect of the Court's recent seniority decision here, plaintiffs have

attached a copy of the brief hereto and specifically incorporate it herein as its response to intervenors contention. For the reasons stated therein, intervenors assertions should be rejected.

Respectfully submitted,

/s/ DENNIS N. BALSKE

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Montgomery, AL 36102-2087
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon Ed Hardin, Rick Meadows, Cynthia Drabek, James S. Ward and John Bell, by U.S. First Class Mail, this 29th day of June, 1984.

/s/ DENNIS N. BALSKE

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

RESPONSE TO ORDER

Comes now the defendant Personnel Board of the State of Alabama and does hereby respond to this Court's order of June 21, 1984.

The above-styled defendant has no objection to the use of the promotional procedure and believes that the procedure does not discriminate against any persons eligible for promotion to the rank of corporal within the Department of Public Safety.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General

By /s/ RICHARD N. MEADOWS
Assistant Attorney General

Address of Counsel:
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250 Administrative Building
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Montgomery, Alabama 36130
(205) 834-5150

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following:

Hon. Dennis N. Balske
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Washington, D.C. 20026

Hon. James S. Ward
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Suite 302
Birmingham, Alabama 35205

by placing said copies in the United States Mail, postage prepaid.

DONE this the 27th day of June, 1984.

/s/ RICHARD N. MEADOWS
Richard N. Meadows
Assistant Attorney General

Address of Counsel:
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250 Administrative Building
64 North Union Street
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IN THE DISTRICT COURT FOR THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF

v.

BYRON PRESCOTT, ETC., ET AL., DEFENDANTS

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTION TO APPROVE SELECTION PROCEDURE

By its order of June 21, 1984, this Court directed the United States to respond to the defendants' motion seeking approval of their selection procedure for promotions to State Trooper Corporal positions. The United States response as follows:

1. Counsel for the United States first learned of defendants' selection procedure for corporal promotions on June 22, 1983, when she learned of the scheduled hearing on defendants' motion.

2. In a telephone conversation with defendants' counsel, Mr. Hardin, the undersigned counsel for the United States was advised generally of the selection procedure and its results, including the following facts:

a. The selection procedure included a written exam that, together with trooper performance ratings, was used as a screening device;

b. Troopers who passed the screening device were interviewed by a 3-member panel;

c. On the basis of the oral interviews, candidates were ranked in the following categories: best qualified, highly qualified, qualified, and unqualified;
d. Of the 256 troopers who applied and took the written test for State Trooper Corporal, 77 (30.1%) were black;
e. Of the thirteen troopers who were rated "best qualified", three (23.1%) are black;
f. All of the troopers rated "best qualified" are deemed equally qualified;
g. The Department of Public Safety believes it is unlikely that it will make promotions from this list beyond the "best qualified" group.

3. Based upon the above representations of counsel, it appears that the selection procedure, up to the point of identifying the thirteen "best qualified" candidates does not have an unlawful adverse impact. See, *Uniform Guidelines on Employee Selection Procedures,* 43 Fed. Reg. 38290, 28 C.F.R. 50.14 (1978), § 4D; *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed. Reg. 11996, March 2, 1979, Q & A #21. Accordingly, the United States does not oppose the defendants' motion to allow corporals to be promoted from their list of "best qualified" candidates.

4. The racial impact of the total selection process cannot be known until actual promotions are made from among the thirteen "best qualified" candidates. According to defendants' representations, the Director of the Department of Public Safety, under this procedure, has discretion to appoint any of the "best qualified" troopers for corporal vacancies that arise. The United States does not believe it is necessary to circumscribe the Director's discretion at this time. However, the actual selections of troopers to be promoted should be monitored closely to prevent any promotions that would result in unlawful adverse impact which would violate federal law or the orders of this Court.

Accordingly, the United States proposes that the defendants be required to identify to plaintiffs, including plaintiff United States, and the Court each trooper who is to be promoted to corporal no less than one week before the promotion is to take effect. If plaintiffs object to the proposed promotion, or if the Court so orders, the promotion should not take effect until the matter is resolved by the Court.

5. The United States has no information about the composition of the group of candidates rated "highly qualified" or "qualified." Therefore, it has no opinion whether promotions from those groups would comply with this Court's orders.

CONCLUSION

Based upon the representations of counsel, the United States believes that the procedure for identifying the thirteen "best qualified" candidates for State Trooper Corporal positions does not have an adverse impact and complies with the orders of this Court. The United States does not oppose the defendants' proposal to select corporals from the list of "best qualified" candidates. The United States submits that actual promotions of individuals selected from that list should not become of effective unless or until (1) one week has elapsed after notification to the Court and to plaintiffs of the individuals to be promoted and no objection has been filed, or (2) any objection having been raised, the Court has resolved the matter pursuant to such proceedings as it deems proper.

Respectfully submitted,

JOHN C. BELL
United States Attorney

By: _____
Kenneth E. Vines
Assistant United States Attorney

/s/ CYNTHIA DRABEK
Cynthia Drabek
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Response of the United States to Defendants' Motion to Approve Selection Procedure by mailing a copy, postage prepaid, to counsel listed below:

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Mr. James S. Ward
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This the 26th day of June, 1984.

/s/ CYNTHIA DRABEK

Cynthia Drabek
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IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ETC., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF

v.

BYRON PRESCOTT, ETC., ET AL., DEFENDANTS

ORDER

This matter is before the Court on defendants' June 19, 1984 Motion to Approve Selection Procedure for Promotion to Corporal. The Court has received written responses of counsel, it received documentary evidence presented by the Department of Public Safety and heard the arguments of counsel for all parties at a hearing on July 3, 1984. The Court having considered the evidence and arguments presented, it is now hereby ORDERED:

1. Subject to the limitations set forth in this Order, defendants Prescott, et al., are permitted to make promotions to State Trooper Corporal from the group of persons designated "best qualified" pursuant to the selection procedure described in defendants' June 19, 1984 motion.

2. Defendants Prescott, et al., shall select corporals from the "best qualified" group in a non-discriminatory manner. Defendants shall provide actual notice of such promotions to counsel for the parties not less than five working days prior to the effective date of such promotions. Such notice shall include the name and race of each person to be promoted and may include any other information defendants deem relevant. If no party files a timely

objection, the promotions designated by defendants shall take effect without further order of this Court. If a party files an objection at least two days prior to the proposed promotions, the promotions in question shall not become effective until the Court so orders, before or after resolution of the objection.

3. The one-for-one quota for corporal promotions, ordered December 15, 1983, shall not apply to the use of this selection procedure as described in paragraphs 1 and 2 of this Order.

4. The parties may proceed with discovery on the issue whether the selection procedure described in the defendants' June 19 motion can be validated as job-related pursuant to *The Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. 50.14, 29 C.F.R. 51.53, and thus shown to be in compliance with the 1979 and 1981 consent decrees, other orders in this case, and federal law.

5. The Court shall conduct further proceedings to determine whether the results of future administrations of the selection procedure presented by defendants Prescott, et al., or a similar procedure, may be used to select State Trooper Corporals without further review. Until further order of this Court, defendants shall make no promotions to State Trooper Corporal positions other than from the group they have identified as the 13 "best qualified" candidates.

DONE this 27th day of July, 1984.

[SIGNATURE]

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NUMBER 3561-N

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., INTERVENORS-DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Defendants-Intervenors, V. E. McClellan, William M. Bailey, D. B. Mansell and Dan Davenport hereby appeal to the United States Court of Appeals for the Eleventh Circuit, from the Order entered in this cause on the 27th day of July, 1984, ordering defendant, Byron Prescott to make promotions to State Trooper Corporal. Defendant-intervenors further give Notice of Appeal of that portion of the Order which designates promotional procedures as set forth in the Paragraphs 1 and 2 of the Order.

Respectfully submitted,

CORLEY, MONCUS, BYNUM, & DEBUYS, P.C.

/s/ JAMES S. WARD

James S. Ward
Attorney for Defendants-Intervenors
2100 16th Avenue, South
Birmingham, Alabama
35205

CERTIFICATE OF FILING

I hereby certify that I have this date filed with the Clerk of the District Court of the United States for the Middle District of Alabama, Northern Division the original and seven copies of the foregoing Notice of Appeal, together with Seventy dollars ($70.00) for the filing and docket fees, and such other instruments as have been completed and included herein for service by the Clerk of a true copy thereof on each of the following:

1. Clerk of the United States Court of Appeals for the Eleventh Circuit together with the appropriate docket fee,
2. Counsel of record:

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Mr. Kenneth E. Vines
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Dated this the 24th day of August, 1984.

/s/ JAMES S. WARD

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IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NUMBER 3561-N

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANTS-INTERVENORS

INTERVENORS OBJECTION TO OPPOSED CORPORAL PROMOTIONS

Come now the Intervenors in the above styled cause and hereby object to the proposed corporal promotions as outlined in the September 5, 1984 letter sent to counsel and the Court by the attorney for the Department of Public Safety. The Intervenors' objections are as follows:

(1) Intervenors adopt and incorporate herein by reference their Response to Defendant Prescott's Motion to Approve Selection Procedure for Promotion to Corporal heretofore filed in this cause on June 28, 1984.

(2) For that Intervenors herein adopt and incorporate by reference the grounds asserted in their Motion to Stay heretofore filed in this cause on or about January 6, 1984 and their Motion to Alter or Amend the Judgment of December 15, 1983 and to Stay its Reinforcement as Amended.

(3) For that Intervenors have filed a Notice of Appeal with the 11th Circuit Court of Appeals challenging this Court's Order of July 27, 1984. Under the circumstances this Court should abstain from approving any promotions

to Corporal until this Appeal can be heard. This Appeal will involve important and substantial questions of constitutional law and statutory construction concerning the recent U.S. Supreme Court case of *Memphis Fire Department, et al.* v. *Stotts* 52 U.S.L.W. 4767 (June 12, 1984). The importance of this case has not escaped the other parties to this litigation as there is presently pending before the 11th Circuit a request for the filing of an Amici Curiae brief concerning the applicability of the *Stotts* issue to the appeal by the parties of this Court's December 15, 1983 Order.

Respectfully submitted,

CORLEY, MONCUS, BYNUM, & DEBUYS, P.C.

/s/ JAMES S. WARD

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35205

CERTIFICATE OF SERVICE

I hereby certify this the 10th day of September, 1984, I served a copy of the foregoin Intervenors Objection to Opposed Corporal Promotions upon the following attorneys by placing a copy of the same in the United States Mail, postage prepaid and properly addressed:

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/s/ JAMES S. WARD
Of Counsel

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NUMBER 3561-N

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL, DEFENDANT-INTERVENORS

MOTION FOR STAY

Come now the Defendants-Intervenors in the above-styled cause, by and through their attorney of record, and respectfully move this Court to enter an Order staying the application of its Order of July 27, 1984 wherein Defendant Prescott is entitled to make promotions to State Trooper Corporal from the group of persons determined "best qualified" pursuant to the selection procedure described in Defendants' June 19, 1984 motion. As grounds for this motion, the Defendants-Intervenors set down and assign the following, separately and severally:

1. To allow promotions would effectively deny and infringe upon the Defendants-Intervenors' right of appeal in that other persons would be promoted and would be receiving the benefits of that promotion and not the Defendants-Intervenors.

2. The recent United States Supreme Court case of *Memphis Fire Department, et al.* v. *Stotts* prohibits quota promotion and expressly disallows schemes of promotion whereby blacks are promoted ahead of whites without any showing that the black was a victim of unlawful discrimi-

nation in employment. Since the previously entered Consent Decrees provide for quota promotion and blacks to be promoted ahead of whites without a showing that the black is or was a victim of unlawful discrimination in employment, any promotional scheme pursuant to those Consent Decrees is unconstitutional, in violation of Title VII, and the *Stotts* decision.

3. For that there is presently pending in the Eleventh Circuit Court of Appeals an appeal from this Court's Order of December 15, 1983 and from this Court's Order of July 27, 1984, that Order being the subject of this motion for stay. (The Eleventh Circuit Court of Appeals requested the parties to address the issue of whether this Court's Order of July 27, 1984 was final and therefore appealable. The parties have responded and as of this date the Eleventh Circuit has not indicated whether they will accept the appeal.) Both appeals will involve the interpretation, affect and applicability of the *Stotts* decision generally and to the facts of this case specifically. This Court should await direction and guidance from the Eleventh Circuit on these issues before allowing promotions to Corporal.

4. Presently at issue is whether the Corporal examination had content validity. If it is determined that the examination had content validity the allowing of promotions would mean that a quota based promotional scheme would be allowed when under any other circumstances an employer could promote on rank order rating based upon a content valid examination.

5. To allow quota promotion pursuant to an examination which has content validity, without any showing that blacks who would be preferentially treated by those quotas were victims of an unlawful discrimination, is in violation of the Constitution of the United States, Title VII and the *Stotts* decision.

6. To allow promotion based upon a promotional scheme accomplished pursuant to Consent Decrees en-

tered when the Defendants-Intervenors were not parties to this litigation, yet where those Decrees subsequently affect their rights to employment and career advancement, is unjust and severely encroaches upon their rights. *Memphis Fire Department, et al.* v. *Stotts.*

7. To allow promotion pursuant to a promotional scheme based upon the previously entered Consent Decrees in this case would be illegal, unreasonable, unconstitutional and contrary to public policy.

8. For that the Department promoted sixteen troopers to the position of corporal approximately six months ago and the Department has not promoted any other troopers to the position of corporal since the Order of July 27, 1984, that being almost three months. Under the circumstances, it would seem that further delay so that the Eleventh Circuit can decide the important and substantial issues raised on appeal would not unduly affect the administration of the Department of Public Safety.

WHEREFORE, PREMISES CONSIDERED, the Defendant-Intervenors pray that this Court enter an Order staying the operation of its July 27, 1984 Order.

Respectfully submitted,

CORLEY, MONCUS, BYNUM, & DEBUYS, P.C.

/s/ JAMES S. WARD

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Birmingham, Alabama 35205

CERTIFICATE OF SERVICE

I hereby certify this the 25th day of October, 1984, I served a copy of the foregoing Motion for Stay upon the following attorneys by placing a copy of the same in the United States Mail, postage prepaid and properly addressed:

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/s/ JAMES S. WARD
Of Counsel

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., INDIVIDUALLY AND ON BEHALF OF THE CLASS SIMILARLY SITUATED, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

ORDER

For good cause, it is ORDERED that the defendant-intervenors' October 25, 1984, motion to stay this court's July 27, 1984, order be and it is hereby denied.

DONE, this the 25th day of October, 1984.

[SIGNATURE]

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 3561-N

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF

v.

BYRON PRESCOTT, ET AL., DEFENDANTS

ORDER

This matter is before the Court on defendants' August 16, 1984 Motion to Approve Selection Procedure for Promotion to Sergeant. The Court has received written responses of counsel, it received documentary evidence presented by the Department of Public Safety and heard the arguments of counsel for all parties at a hearing on October 25, 1984. The Court having considered the evidence and arguments presented, it is now hereby ORDERED:

1. Subject to the limitations set forth in this Order, defendants Prescott, et al., are permitted to make promotions to State Trooper Sergeant from the group of 13 persons designated "most qualified" pursuant to the selection procedure described in defendants' September 10, 1984, submission.

2. Defendants Prescott, et al., shall select sergeants from the "most qualified" group in a non-discriminatory manner. Defendants shall provide actual notice of such promotions to counsel for the parties not less than five working days prior to the effective date of such promotions. Such notice shall include the name and race of each person to be promoted and may include any other infor-

mation defendants deem relevant. If no party files a timely objection, the promotions designated by defendants shall take effect without further order of this Court. If a party files an objection at least two days prior to the proposed promotions, the promotions in question shall not become effective until the Court so orders, before or after resolution of the objection.

3. The one-for-one quota for sergeant promotions, ordered December 15, 1983, shall not apply to the use of this selection procedure as described in paragraphs 1 and 2 of this Order.

4. The Court shall conduct further proceedings upon motion of a party to determine whether the results of future administrations of the selection procedure presented by defendants Prescott, et al., or a similar procedure, may be used to select State Trooper Sergeants without further review. Until further order of this Court, defendants shall make no promotions to State Trooper Sergeant positions other than from the group they have identified as the 13 "most qualified" candidates.

DONE, this 25th day of October, 1984.

[SIGNATURE]

United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 85-999

UNITED STATES, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ORDER ALLOWING CERTIORARI. Filed July 7, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted, limited to Question 3 presented by the petition.

AUG 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-999

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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MICHAEL CARVIN
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49pp

QUESTION PRESENTED

Whether the one-black-for-one-white promotion quota adopted by the district court, and sustained by the court of appeals, is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: the United States of America; Phillip Paradise, Jr., and the class he represents; the Alabama Department of Public Safety and its director, Byron Prescott; V. E. McClellan, William M. Bailey, D. B. Mansell, Dan Davenport, and the class they represent.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-999

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 767 F.2d 1514. The order and memorandum opinion of the district court (Pet. App. 55a-64a; J.A. 128-137) are reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the court of appeals (Pet. App. 83a-84a) was entered on August 12, 1985. On November 5, 1985, Justice Powell extended the time

within which to file a petition for a writ of certiorari to and including December 10, 1985. The petition was filed on that date and was granted, limited to the third question presented, on July 7, 1986 (J.A. 178). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This dispute arises from a lawsuit challenging discrimination in hiring by the Alabama Department of Public Safety (the Department). The original class action was brought by the NAACP in January 1972. The United States was joined as a party plaintiff, and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs (Paradise) shortly thereafter (Pet. App. 3a).

In 1972, the district court held that the Department had violated the Fourteenth Amendment by "engag[ing] in a blatant and continuous pattern and practice of discrimination in hiring." *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (M.D. Ala.) (*reprinted at* J.A. 23). This finding of discrimination was based in part upon the "unexplained and unexplainable" fact that "[i]n the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the [D]epartment have been nonmerit system laborers." *Ibid.* The court ordered the Department to hire one black trooper for each white trooper hired until blacks comprised approximately 25% of the state trooper force. 340 F. Supp. at 706 (*reprinted at* J.A. 27). The court directed that "eligible and promotional registers heretofore used for the purpose of hiring troopers be * * * abrogated," and it enjoined the Department from "engaging in any employment

practices, including * * * promotion * * *, for the purpose or with the effect of discriminating against any employee * * * on the ground of race or color." 340 F. Supp. at 706-707 (*reprinted at* J.A. 27-28). The court of appeals affirmed the district court's order. 493 F.2d 614 (5th Cir. 1974).

In 1975, the district court granted supplemental relief to the plaintiffs. It found that the Department, "for the purpose of frustrating or delaying full relief to the plaintiff class, [had] artificially restricted the size of the trooper force and the number of new troopers hired" (J.A. 34). The court enjoined the Department from engaging in such conduct and ordered it to file status reports concerning its progress in hiring blacks (*id.* at 35, 36).

In 1979, the Department sought clarification of the district court's 1972 order, "ask[ing] whether the [25%] hiring quota applies to the entire state trooper force or just to entry-level troopers." *Paradise* v. *Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala.). The Department pointed out that its "promotion policy prohibits lateral hiring and requires advancement through the ranks." Because the 1972 order "did not impose promotional quotas," the Department said, "the ratio of blacks in entry-level positions must approach 37.5 percent" in order for the overall trooper force to be 25% black. 470 F. Supp. at 441. The district court responded that the 1972 order requiring 25% black representation in the trooper force unambiguously "refers to the entire force of sworn officers, not just to those in the entry-level rank," and it ruled that the "law of the case" doctrine barred reconsideration of that issue (*ibid.*). In this regard, the court held:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The [hiring] quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest.

470 F. Supp. at 442 (emphasis in original). See J.A. 63; Pet. App. 10a-12a. The district court accordingly denied the Department's motion for supplemental relief (470 F. Supp. at 442).[1]

2. In 1979, after Paradise had moved for supplemental relief, the parties entered into a consent decree that for the first time addressed the issue of promotions. The Department generally agreed to "have as an objective * * * an employment and promotion system that is racially neutral" (J.A. 37)

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[1] The Department since 1975 has consistently complied with the one-for-one hiring quota. As of April 1983, the overall trooper force was "approximately 22%-23% black" (J.A. 62). Since the opinion below was issued, the percentage of blacks in the overall trooper force has apparently reached parity (25%). Accordingly, the defendants recently filed with the district court a motion requesting rescission of the hiring quota. See Defendants' Motion for Relief of Judgment (May 12, 1986).

and "not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks * * * [or] which discriminates on the basis of race in hiring, promotion, upgrading, training, assignment [or] discharge" (*id.* at 38). With respect to promotions, the Department agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal" (*id.* at 40).

In pursuit of these general objectives, the Department specifically agreed "to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines* [*on Employee*] *Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal" (J.A. 40).[2] The Department pledged to formulate a promotion procedure for the position of corporal that would be submitted for the plaintiffs' review and the court's approval "no later than one year from the signing of th[e] Consent Decree"—that is, by February 16, 1980 (*id.* at 40, 45). Once a new procedure for promotion to corporal had been validated, the Department agreed that it would "begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of

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[2] The *Uniform Guidelines*, currently set forth at 29 C.F.R. 1607, are a joint pronouncement of the EEOC, the Department of Justice, the Department of Labor, and the Civil Service Commission. The *Guidelines* "are designed to provide a framework for determining the proper use of tests and other selection procedures" to ensure nondiscrimination. 29 C.F.R. 1607.1(B).

lieutenant, captain, and major" (*id.* at 41). As an interim measure, the parties agreed to use the state merit system for all promotions to corporal (*ibid.*). The interim procedure was elaborated in a side agreement among the parties (*id.* at 46-48), and, pursuant to the consent decree and that agreement, we understand that four black troopers and six white troopers were promoted to corporal in February 1980. See *id.* at 46-48, 62.

3. In April 1981, some two years after the signing of the consent decree, the Department proposed a selection procedure for promotion to corporal and requested that the district court approve it.[a] The United States and Paradise filed a joint response objecting to the Department's proposal, maintaining that the examination had not been validated in accordance with the *Uniform Guidelines* and that its use would not be justified if the results had an "adverse impact" on black applicants (Pet. App. 12a; J.A. 50). In the hope of expeditiously establishing an acceptable promotion procedure, however, the parties, including the United States, entered into a second consent decree in August 1981 (J.A. 49-54). The parties thereby agreed that the proposed corporal's examination would be administered and scored; that the scores would be used in conjunction with other factors to rank applicants on a promotion register; and that the promotion register would "be reviewed to determine whether the selection procedure has an adverse impact against black applicants" (*id.* at 51).

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[a] The proposed promotion procedure was composed of four components, weighted as follows: written examination (60%), length of service (10%), supervisory evaluation (20%), and service ratings (10%). See J.A. 55-57; Pet. App. 12a & n.8.

The parties further agreed that the determination of whether the proposed procedure had an "adverse impact" would be "measured by the 'four-fifths rule' set forth in * * * the *Uniform Guidelines*" (J.A. 52). Under the "four-fifths rule," the proposed promotion procedure would be judged to have an adverse impact on blacks if it produced a selection rate for black applicants that was less than 80% of the selection rate for white applicants. See 29 C.F.R. 1607.4(D). If the proposed procedure turned out to have such an "adverse impact," the Department was to come up with an alternative procedure for making promotions to corporal "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively" (J.A. 52, 53). If the proposed procedure proved unsatisfactory and the parties were unable to agree on a new procedure, the matter was to be "submitted to the [c]ourt for resolution" (*id.* at 53). No further promotions to corporal were to be made until a satisfactory procedure was put in place (*ibid.*).

In accordance with the consent decree, the Department in October 1981 administered its written corporal's examination to 262 applicants, of whom 60 (or 23%) were black (Pet. App. 14a; J.A. 119). A promotion register was prepared based on the examination results and the other relevant factors. See page 6 & note 3, *supra*. Of the 60 blacks who took the test, only five were listed in the top half of the register and the highest-ranked black was number 80 (Pet. App. 14a; J.A. 119). Rank-ordered use of the register would thus have resulted in no blacks being promoted to corporal even if 79 troopers were promoted (J.A. 120). In June 1982, the Department advised the United States that there was a current

need for eight to ten promotions to corporal, and that a total of 16 to 20 corporal promotions were expected to be made from the 1981 register before the formulation of a new list (Pet. App. 14a). The United States objected to rank-ordered use of the 1981 register, contending that "such use would result in substantial adverse impact on black applicants," and suggested that the Department should submit an alternative proposal for making promotions in conformity with the 1979 and 1981 consent decrees (*id.* at 14a-15a). No such proposal was submitted, and no promotions were made, during the next nine months.

4. In April 1983, Paradise moved the district court for an order enforcing the terms of the two consent decrees (Pet. App. 15a; J.A. 58). He urged that the selection procedure for corporals administered in 1981 had had a demonstrably adverse impact on black applicants (Pet. App. 15a; J.A. 60), and he sought an order directing the Department to comply with the consent decrees by implementing acceptable promotion procedures, both for the rank of corporal and for the higher ranks (*id.* at 58). He also sought an order directing the Department immediately "to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of * * * the parties' consent decrees" (*id.* at 59). Specifically, referring to the hiring quota imposed in 1972, Paradise submitted that "blacks should be promoted to corporal at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure" (*id.* at 62). Paradise argued that a promotion quota would "encourage defendants to develop a valid promotional

procedure as soon as possible" and would "help to alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department" (*ibid.*).

The United States agreed that the consent decrees should be enforced by ordering some promotions, stating that the Department's failure to come up with a promotion plan in conformance with the consent decrees "suggests that a pattern of discrimination against blacks in the Department * * * may be continuing" (Pet. App. 15a-16a & n.10). The United States opposed, however, the imposition of a one-black-for-one-white promotion quota as a method of enforcing the consent decrees (*ibid.*). Four white troopers moved to intervene on behalf of a class (intervenors) composed of the top-ranked white applicants on the 1981 promotion register (J.A. 81-87). They urged principally that the 1981 corporal's exam had been administered "in a racially neutral and non-discriminatory manner" and that its results should be effectuated (*id.* at 107).

In an order entered October 28, 1983, the district court agreed with the United States and Paradise that the 1981 promotion procedure was unacceptable under the consent decrees because it had an "adverse impact" on black applicants. *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala.) (*reprinted at* J.A. 117-124). The court noted that the Department "need[ed] additional corporals and * * * need[ed] at least 15 of them as soon as possible" (J.A. 119). Applying the "four-fifths rule" of the *Uniform Guidelines*, the court observed that, if the 1981 promotion register were used in rank order, "the success rate for white persons would be 15/202 or 7.4%, and the success rate for black persons would be 0/60 or 0%" (J.A. 120). Pointing out that "[z]ero is, of course,

less than four-fifths of 7.4," the court suggested that, "[s]hort of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact" (J.A. 120-121).[4] The court ordered the Department to submit, by November 10, 1983, "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123).

On November 10, 1983, the Department duly filed with the court a proposal to promote 15 troopers to the rank of corporal, of whom 11 (or 73%) would be white and four (or 27%) would be black (J.A. 125-126). In support of this proposal, the Department stated that it had "an immediate need for at least fifteen * * * Corporals," that "this percentage of blacks to whites reflects the percentage of blacks to whites who took the Corporal's examination," and

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[4] The Department and the intervenors contended that rank-ordered use of the 1981 promotion register would not work an "adverse impact" under the four-fifths rule, noting the *Guidelines'* caveat that "[g]reater differences in selection rate may not constitute adverse impact * * * where special recruiting or other programs cause the pool of minority * * * candidates to be atypical" (29 C.F.R. 1607.4(D)). The Department argued "that the one-to-one hiring ratio for state troopers is a 'special program' which has resulted in an atypical pool because black troopers scored lower on a 'hiring test' than did white troopers" (J.A. 121). The district court rejected this argument, agreeing with the United States and Paradise that a hearing was unnecessary on this question and that the Department's proffered evidence was "an unacceptable basis [on which] to rest a claim of atypicality" (*ibid.*). The court stated that "[t]he hiring test, to which the defendants wish to link their promotion procedure, has not been subjected to an adverse impact determination, nor has it been validated" (*ibid.* (footnote omitted)).

that this proposal would meet "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact" (*ibid.*). The Department pledged to cooperate with the Alabama Department of Personnel to develop a permanent procedure for promotion to corporal "as soon as possible" (*id.* at 126). The United States did not oppose the Department's proposal, but Paradise continued to insist upon a one-for-one promotion quota (Pet. App. 18a-19a).

5. On December 15, 1983, the district court granted Paradise's motion to enforce the consent decrees (J.A. 128-129). As Paradise had requested, the court imposed a quota requiring the Department "to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank" (*id.* at 128). The court ordered this promotion quota to "remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the [Department has] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal requirements" (*ibid.*). The court found that the quota was necessary to cure "racial imbalances in the upper ranks" (*id.* at 135) and that it was "reasonable" under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). See J.A. 135-136. The court said that the Department "ha[d] the prerogative to end the promotional quotas at any time, simply by developing * * * promotion procedures" in compliance with the consent decrees, so that the quota might prove "to be a one-time occurrence" (J.A. 136). Finally, the court ordered the Department to submit within 35 days "a schedule for the

development of promotion procedures for all ranks above the entry-level position" (J.A. 129). The Department, the intervenors, and the United States appealed from the December 13, 1983, order.

In February 1984, eight blacks and eight whites were promoted to corporal under the quota (Pet. App. 22a). The Department filed its schedule with the court as required, pledging to develop an acceptable procedure for promotion to corporal within five months (Pet. App. 45a; J.A. 151). The Department duly submitted its proposal on June 19, 1984, and moved the district court to approve it (Pet. App. 45a-47a; J.A. 144-145). The United States expressed the view that the proposed procedure would not have an "adverse impact" upon black applicants and hence was acceptable under the consent decrees (Pet. App. 48a; J.A. 159-161). The other parties, except for the intervenors, agreed with that assessment (see Pet. App. 48a; J.A. 146-150, 157).

On July 27, 1984, the district court ruled that the Department could promote up to 13 troopers to corporal in accordance with the newly proposed selection procedure (J.A. 163-164). The one-for-one promotion quota was temporarily suspended for that purpose (*id.* at 164). The court retained jurisdiction to decide whether future uses of the selection procedure for corporals were similarly without an "adverse impact" on blacks, and it ordered the parties to proceed with discovery to determine whether the procedure could be validated as job-related under the *Uniform Guidelines* (*ibid.*). After the intervenors' motion for a stay was denied (*id.* at 167-175), 13 troopers were promoted to corporal, of whom three were black and ten were white. See Pet App. 47a; J.A.

160. The intervenors alone appealed from the July 27, 1984, order (Pet. App. 48a; J.A. 165).[5]

6. The court of appeals consolidated the various appeals from the district court's December 15, 1983, order and the intervenors' appeal from the July 27, 1984, order and affirmed the district court in all respects (Pet. App. 1a-54a). The court first rejected the appellants' contention that the district court, in ordering the one-black-for-one-white promotion quota,

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[5] On August 16, 1984, after the district court had issued its order respecting promotions to corporal, the Department, pursuant to the agreed-upon schedule, submitted its proposed procedure for promotion to sergeant (J.A. 176). The district court ruled that the Department could promote up to 13 sergeants pursuant to that procedure, and it temporarily suspended the one-black-for-one-white quota for that purpose (Pet. App. 53a-54a n.19; J.A. 176-177). Promotions were made to sergeant (as they were previously made to corporal) from a "best qualified" list, on which two of thirteen candidates for sergeant were black. The one-for-one promotion quota has thus been applied in actual practice only once, and the question of the quota's constitutionality has limited retrospective importance since its invalidation could not lead to demotion of the eight blacks promoted under it. See *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 n.11 (1984). As we noted in our petition (at 7 n.3), however, the case is far from moot, because imposing the quota has continuing prospective effects. Although the quota has been temporarily suspended for promotions to corporal and sergeant, it could apply again if those selection procedures in the future produce an "adverse impact" on blacks or if they cannot be validated under the *Guidelines*. And while the quota does not now apply to promotions to ranks above sergeant because of the current absence of objectively qualified black applicants for such positions (Pet. App. 53a-54a n.19), the quota will eventually apply to such promotions unless the Department develops acceptable selection procedures for those ranks. We discuss the continuing effects of the quota at page 24, *infra*.

had "improperly modified, rather than enforced, the 1979 and 1981 [Consent] Decrees" (Pet. App. 23a). The court interpreted the consent decrees to bar an "adverse impact" only against blacks, and not against whites, seeking promotion (*id.* at 25a-26a). The court accordingly held that "the district court, faced as it was with the Department's representation that promotions needed to be made immediately, did not * * * exceed the relief authorized by those decrees when it granted plaintiffs' motion to enforce" (*id.* at 27a (footnote omitted)).

The court of appeals then held that the one-for-one promotion quota violated neither Title VII (Pet. App. 28a-35a), nor the Equal Protection Clause (*id.* at 35a-42a). On the constitutional issue, the court upheld the quota because of "the long history of discrimination in the Department" (*id.* at 39a) and because "the relief now at issue was designed to remedy the present effects of past discrimination" (*id.* at 40a). The court concluded that the promotion quota was "substantially related to the objective of eradicating [those] effects" and that it extended no further than necessary to remedy the "longstanding racial imbalances in the upper ranks of the Department" (*id.* at 41a). The court observed that the promotion quota was "a temporary measure" which would "cease to exist when * * * the Department succeeds in doing what it promised to do years ago" (*ibid.*). The court noted that the quota did not require the promotion of any unqualified black trooper, did not absolutely bar qualified white troopers "from advancement through the ranks," and did not "require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper" (*ibid.*). The opinion contains no

discussion as to whether there existed any less intrusive or more narrowly tailored means of enforcing the Department's compliance with its obligations under the consent decrees.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1972 the United States has stood with the plaintiffs and the courts below in their efforts to end discrimination by the Alabama Department of Public Safety. We have urged and supported remedial efforts in respect to promotion as well as hiring. In our petition for certiorari we objected to only one of the district court's remedial provisions: the 1983 imposition of a one-for-one promotion quota for certain ranks, to remain in effect until the Department comes forward with a proper long-term procedure that does not have an adverse impact on black aspirants for promotion to each of these grades. That promotions be made according to the consent decrees and that promotions should thus display approximate parity with the applicant pool are propositions that are not in issue in this case.

In seeking certiorari, the principal purpose of the United States was to illuminate further the proposition we drew from *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), that preferential relief under Title VII was available only to the actual

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[6] The court of appeals also rejected (Pet. App. 45a-53a) the intervenors' challenge to the district court's July 27, 1984, order permitting the proportional promotion of three black and ten white corporals. See *id.* at 47a; J.A. 160. The intervenors have not petitioned for review of that holding, and hence no question concerning it is presented here. The propriety of the subsequently ordered promotions to sergeant (see page 13 note 5, *supra*) is likewise not before this Court.

victims of discrimination, a proposition we asserted had constitutional dimensions as well. In *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), the Court stated last Term that race-conscious relief may be available in certain instances of egregious discrimination. We take that holding as a premise for our argument here, which addresses only the narrow question—the only question on which the Court granted review—whether the one-for-one promotion quota imposed in addition to and on top of the other relief (relief requiring a hiring quota and a proportionate promotion remedy) violates the Constitution. We believe the one-for-one promotion quota to be plainly unconstitutional in the light of the Court's recent pronouncements in *Sheet Metal Workers* and *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986).

First, particularly in light of the specific context in which it was superimposed, we believe this quota requires discrimination against innocent white state employees for no independently justifiable remedial purpose. The district court appears to have intended the one-for-one quota in part as an *in terrorem* device to compel the Department to adopt proper promotion procedures. In our view this puts the wrong gun to the wrong head, holding innocent white state troopers hostage for the purpose of ending the Department's alleged recalcitrance. The courts below appear also to have embraced a purpose to attain numerical "balance" of races at each level of the police force. This we believe goes well beyond a proper remedial purpose and cannot be justified under the Court's decisions in *Sheet Metal Workers*, *Wygant*, and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

Second, even if either of these purposes were properly viewed as part of the remedy for the Department's clear and intentional pre-1975 hiring discrimination, nonetheless the one-for-one promotion quota imposes unnecessarily heavy burdens on a small number of identified white competitors for promotions, and is therefore unconstitutional for the same reason the layoffs in *Wygant* were found to be unconstitutional. Particularly in the context of civil service public employment, the prospects of regular promotion and an orderly progression through the ranks are an important aspect of a new entrant's career expectations. To diminish those prospects for a defined group of individual white entrants as drastically as this one-for-one quota would do is to blight those expectations—and on racial grounds—as surely as did the denial of job security pursuant to race-based lay-off quotas in *Wygant* and *Stotts*.

ARGUMENT

THE ONE-BLACK-FOR-ONE-WHITE PROMOTION QUOTA ORDERED BY THE DISTRICT COURT IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST, AND IT IS THEREFORE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. A Racial Classification Must Be Narrowly Tailored To Achieve A Compelling Governmental Interest In Order To Satisfy Strict Constitutional Scrutiny

1. The proper standard by which to evaluate the constitutionality of race-conscious governmental action under the Equal Protection Clause is now clear. "[R]acial classifications of any sort must be subjected to 'strict scrutiny.'" *Wygant*, slip op. 1-2 (O'Connor, J., concurring in part and concurring in

the judgment). Strict scrutiny applies regardless whether the purpose of the discrimination is characterized as malevolent or benign, and regardless of the race of its victims. *E.g.*, *Bakke*, 438 U.S. at 294 (opinion of Powell, J.); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). As the plurality stated in *Wygant*, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subjected to governmental discrimination" (slip op. 5). Any less stringent analysis, such as a "test of 'reasonableness[,]' * * * has no support in the decisions of this Court" (*id.* at 10-11).[7]

Under strict scrutiny, " '[a]ny preference based on racial or ethnic criteria must necessarily receive

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[7] Justice White concurred separately in *Wygant* and thus did not join the opinion of the four Justices who explicitly stated that all racial classifications are subject to "strict scrutiny." As the plurality in *Wygant* noted, however, Justice White had previously joined that portion of Justice Powell's opinion in *Bakke* which stated that discrimination against nonminorities is to be assessed under this standard. See *Wygant*, slip op. 4, quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Thus, at least five Justices have subscribed to this position. See also *Fullilove* v. *Klutznick*, 448 U.S. 448, 551 (1980) (Stevens, J., dissenting). Three members of the Court have recently expressed the view that a somewhat less rigorous standard is appropriate where a racial classification discriminates against white persons. See, *e.g.*, *Wygant*, slip op. 7 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting). These Justices nevertheless have required a " 'strict and searching' * * * inquiry" in such instances. See *id.* at 7 (Marshall, J., dissenting). See also *Wygant*, slip op. 4 (Stevens, J., dissenting) (distinguishing between inclusionary and exclusionary measures).

a most searching examination to make sure that it does not conflict with constitutional guarantees.'" *Wygant*, slip op. 5 (plurality opinion), quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.). Thus, "to pass constitutional muster, [racial classifications] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore* v. *Sidoti*, 466 U.S. 429, 432-433 (1984), quoting *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). In order to be deemed "necessary to the accomplishment" of their purpose, moreover, laws employing racial or other inherently suspect classifications "must be drawn with precision * * * and must be tailored to serve their legitimate objectives." *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) (original quotation marks omitted). If there are other reasonable ways to achieve those objectives, the government "may not choose the way of greater interference." *Ibid.* See, *e.g.*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Strict scrutiny thus consists of "two prongs." *Wygant*, slip op. 5 (plurality opinion). "First, any racial classification must be justified by a compelling governmental interest. * * * Second, the means chosen by the [government] to effectuate its purpose must be narrowly tailored to the achievement of that goal." *Ibid.* (original quotation marks omitted). In other words, unless both the end and the means are permissible, a racial classification cannot stand.

2. It is of course clear beyond peradventure that the government has a "compelling interest" in remedying past discrimination practiced by a public employer. The standards for determining whether a

particular remedial measure is "narrowly tailored" to that end were elaborated last Term in *Wygant*. In holding racially based layoffs an impermissible remedy, the plurality stated that the term "narrowly tailored" in one sense "require[s] consideration whether lawful alternative and less restrictive means could have been used" (slip op. 11 & n.6). "Or, as Professor Ely has noted, the classification at issue must 'fit' with greater precision than any alternative means" (*ibid.*, quoting Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974)). " 'Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification' " (*Wygant*, slip op. 11-12 (plurality opinion), quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)).[8]

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[8] The standards of "strict scrutiny" apply to the instant case even though the court of appeals ruled that the one-for-one promotion quota was designed to enforce the 1979 and 1981 consent decrees (Pet. App. 22a-27a) and that "those decrees * * * fully authorized the promotion quota" (*id.* at 40a). Although this Court held in *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), that parties may voluntarily enter into a consent decree that exceeds the limitations of judicially ordered remedies provided by Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), the Court emphasized that "approval of a consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters*, slip op. 26. As Justice O'Connor there stated, "nonminority employees * * * remain free to challenge the race-conscious measures * * * as violative of their rights under * * * the Fourteenth Amendment." *Firefighters*, slip op. 1 (O'Connor, J., concurring). And even if nonminority employees had not been present as intervenors in the instant case, the Court "should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate * * *

B. The Promotion Quota Ordered By The District Court Is Not Narrowly Tailored To Remedy The Department's Past Discrimination

As we have stated, there can be no doubt that the government has a "compelling interest" in remedying racial discrimination practiced by a public employer. It is that interest which from the outset of this protracted litigation has been urged to justify the various race-conscious remedial measures ordered by the courts since 1972.[9] The United States has consistently maintained and the courts below have correctly concluded that the hiring discrimination originally practiced by the Department was "unquestionably a violation of the Fourteenth Amendment." *NAACP* v. *Allen*, 340 F. Supp. at 705. And as the courts below found, the Department's hiring discrimination for almost four decades had excluded blacks from any jobs at all, including jobs in the upper ranks (Pet. App. 10a-12a; J.A. 63). See also *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. Given the pervasive past discrimination practiced by the De-

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the Fourteenth Amendment" (*ibid.*). In any event, the challenge here is not to the consent decrees per se, but to the district court's imposition of a particularly rigid and burdensome racially based promotion quota as a method of enforcing those decrees.

[9] Those prior race-conscious measures include the one-black-for-one-white hiring quota implemented in 1972 and the proportional promotion procedure required to be implemented under the 1979 and 1981 consent decrees. The original hiring quota has long since become "law of the case" (*Paradise* v. *Shoemaker*, 470 F. Supp. at 441), and the court of appeals below correctly held that "the validity of the 1979 and 1981 [consent] Decrees [was] not properly before [it]" (Pet. App. 49a n.18). There is thus no occasion for the Court to address the propriety of those earlier remedial measures.

partment, we have no hesitation in agreeing that the first prong of this Court's "strict scrutiny" test is met here.[10]

Although we agree that there exists a "compelling governmental interest" in remedying the Department's past discrimination, we cannot agree that the one-for-one promotion quota sanctioned by the lower courts is a "narrowly tailored" means of achieving that end. As the history of this litigation illustrates, the district court has already imposed a series of race-conscious measures designed to cure the effects of the Department's prior discrimination in hiring. The United States as plaintiff is a party to the 1979 and 1981 consent decrees, which are the "law of the case," and we agreed with Paradise that those decrees should be enforced and that promotions should be ordered, consistently with the consent decrees, in a manner that would have "little or no adverse impact upon blacks seeking promotion to corporal." (Pet. App. 15a-16a & n.10; J.A. 40). We parted company with Paradise below, and we part company with him here, on the question whether a one-black-for-one-white promotion quota is "a legally appropriate means" of accomplishing those objectives. *Wygant*, slip op. 9 (plurality opinion). In approving that

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[10] As we shall explain more fully below (pages 30-35, *infra*), the district court and the court of appeals, in sanctioning the one-for-one promotion quota, also seem to have been pursuing the different and additional objective of attaining some numerical proportion or "racial balance" in the Department's upper ranks. To the extent that the courts sought to justify the challenged quota on that ground, rather than on the ground of remedying the Department's past discrimination in hiring, those courts not only failed to identify a "compelling governmental interest," but relied upon an objective that we believe to be constitutionally impermissible.

quota over our objections, the courts below did not consider "whether lawful alternative and less restrictive means could have been used" to achieve the desired ends. *Wygant*, slip op. 11 n.6 (plurality opinion). Indeed, besides failing to ascertain whether the promotion quota is "narrowly tailored" within the meaning of this Court's decisions, neither the district court [11] nor the court of appeals [12] conducted "strict scrutiny" at all.

1. The quota ordered by the district court appears to have been intended in part as an *in terrorem* enforcement device, designed to induce the Department's compliance with its obligation under the consent decrees to develop and implement a permanent promotion procedure that would have "little or no adverse impact upon blacks" (J.A. 40). The quota was first proposed by Paradise in a "motion to enforce the terms of the * * * consent decree[s]" (J.A. 58, 62). The quota was defended by Paradise on the ground that it would "encourage defendants to develop * * * as soon as possible" a promotion procedure consistent with the consent decrees (J.A. 62). Paradise conceded that the quota would "perhaps not be necessary" if the defendants had timely implemented an acceptable promotion plan, asserting that it was "defendants' perennial non-compliance that necessitates this action" (J.A. 62 n.3). The quota was adopted by the district court in a ruling that granted "the

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[11] See Pet. App. 63a-64a (finding the promotion quota "reasonable" under *United Steelworkers* v. *Weber*, *supra*).

[12] See Pet. App. 35a-42a & n.15 (employing a variety of tests, none strict scrutiny, including whether "the measures employed are reasonable" and whether they are "substantially related" to the objective of eradicating the present effects of past discrimination).

plaintiffs' * * * motion to enforce the terms of the * * * consent decree[s]" (J.A. 128). The *in terrorem* enforcement purpose of the quota is evidenced by the nature of the relief granted, for the quota was to remain in place until "the defendants have developed a promotion plan * * * which meets the prior orders and decrees of the court" (*ibid.*) and was to be abandoned when the Department came into compliance. This *in terrorem* threat, moreover, would inevitably continue for many years, since the Department would be able to demonstrate that a promotion procedure for a particular rank had no "adverse impact" on blacks only when a sufficient number of blacks, consistently with the time-in-grade rules, had reached the next lower rank and thus qualified for promotion. As an enforcement device, therefore, the one-for-one quota was designed to operate against the Department for a long time to come.

Insofar as the promotion quota was intended to coerce the Department's compliance with its obligation to formulate acceptable promotion procedures, or to punish it for its alleged delay in doing so,[13] that

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[13] Although Paradise alleged that the Department had been guility of "perennial non-compliance," in the four years after the signing of the 1979 consent decree, the Department in reality had acted with reasonable diligence to devise a new corporal's examination, to administer and evaluate it pursuant to the 1981 consent decree, and, when objections were raised to the examination, to propose an alternative plan to promote four blacks and eleven whites to corporal on a proportional basis. Since the district court's decision was rendered, the Department has timely proposed, and the district court has tentatively approved, procedures for promotion to corporal and sergeant. See pages 12-13 & note 5, *supra*. Both Paradise and the courts below failed to appreciate how difficult it is to develop and implement selection procedures that satisfy the

race-conscious relief was plainly not "narrowly tailored" to achieve its end. A racial classification is "narrowly drawn" only if it "fit[s] with greater precision than any alternative means" and if no "nonracial approach or * * * more narrowly tailored racial classification could promote the [governmental] interest about as well." *Wygant*, slip op. 11 n.6 (plurality opinion) (original quotation marks omitted). But plentiful alternatives were in fact available to the district court. The court could have imposed stringent contempt sanctions, including heavy fines and attorneys' fees, to remain in effect until the Department produced an acceptable long-term promotion plan. See, *e.g.*, *Sheet Metal Workers*, slip op. 17-19. The court could have considered appointing a trustee or administrator to supervise the Department's progress, or even to make the promotions himself by the proper standard. See *id.* at 56-57. And

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rigorous standards of the *Uniform Guidelines*. As the district court itself previously recognized (*NAACP* v. *Allen*, 340 F. Supp. at 706), the validation of selection procedures is an expensive and time-consuming process usually extending over several years. This is particularly true of jobs, like the state trooper jobs here, that require skills not easily measured by written exams. See also *Connecticut* v. *Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring); *Clady* v. *City of Los Angeles*, 770 F.2d 1421, 1431 (9th Cir. 1985); *Vuyanvich* v. *Republic Nat'l Bank*, 505 F. Supp. 224, 369-370 (N.D. Tex. 1980); *Baker* v. *City of Detroit*, 483 F. Supp. 930, 971 (E.D. Mich. 1979). The task was even more difficult and time-consuming here because the Department also had to ensure that the tests, besides being properly validated, were without an "adverse impact." In any event, despite the absence of a validated long-term selection procedure, the Department has made all promotions since 1980 on a basis that was proportional as between blacks and whites.

if the court found that individual blacks would have been promoted earlier but for the Department's alleged procrastination, and if the court determined that specific relief was needed to remedy that fault, competitive seniority could have been awarded. See *Wygant*, slip op. 15 n.12 (opinion of Powell, J.); *Teamsters* v. *United States*, 431 U.S. 324, 365-371 (1977).

As an injunction that aimed to punish or coerce the Department, in short, the quota ordered by the district court misses the mark by a rather wide margin. "[I]t is not the enjoined party," as the Seventh Circuit has observed, "but rather the persons on the eligibility roster passed over as a result of the quota who bear the real burden" of such an order. *United States* v. *City of Chicago*, 663 F.2d 1354, 1361 (1981) (en banc). Nonminority troopers on the Department's eligibility roster had strong and legitimate expectations that they would be considered for promotion based on their merit and seniority, and, as we explain in greater detail below (pages 38-42, *infra*), the burden that the quota imposed upon them was considerable. As an *in terrorem* enforcement device, therefore, the promotion quota was the wrong gun, and it was aimed at the wrong head.

2. a. In support of the challenged promotion quota, Paradise advanced, and the district court adopted, a second and distinct justification for that race-conscious relief. In his motion to enforce the consent decrees, Paradise emphasized that no promotions to corporal had been made in several years and that the Department urgently needed new promotions to that rank (J.A. 61 & n.1). He argued that the promotion procedure proposed by the Department in 1981 had proven to have an "adverse impact" on blacks (*id.*

at 60-61), with the result that there currently existed no promotion mechanism that complied with the consent decrees (*id.* at 63-64). Paradise accordingly requested that the Department be ordered, not only to discharge its obligation to develop and implement the requisite long-term promotional procedure, but also, on a more immediate basis, "to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of * * * the parties' consent decrees" (*id.* at 59, 64). Paradise submitted that, in view of the Department's delay in developing a long-term solution, a one-for-one promotion quota was a "reasonable and necessary" means of making promotions (*id.* at 62 & n.3). The consent decrees, in Paradise's words, required the court to decide "what percentage of the forthcoming * * * promotions should be black" (*id.* at 61).

In response to Paradise's motion, the district court recited the parties' understanding that the Department "need[ed] additional corporals and * * * need[ed] at least 15 of them as soon as possible" (J.A. 119). The court refused to delay the impending promotions until an acceptable long-term plan had been implemented by the defendants. The court accordingly ordered the Department, within two weeks, to "file with the court a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (*id.* at 123). The Department responded with a proposal to promote four blacks and eleven whites, a proposal to which the United States as plaintiff expressed no objection. See *id.* at 125-126; Pet. App. 18a-19a.

Confronted with the two proposals that had been placed on the table—the one-for-one quota proposed

by Paradise and the four-and-eleven plan proposed by the Department—the district court clearly erred in opting for the former. If one assumes *arguendo* that some form of race-conscious relief was needed to promote 15 corporals consistently with the consent decrees—decrees that required promotions to be made in a way that would have "little or no adverse impact on blacks" (J.A. 40)—the Constitution mandated that the district court choose a means that was "narrowly tailored" to this end. *Wygant*, slip op. 11, 15 (opinion of Powell, J.). But the Department's proposal, as compared with the extreme quota upon which Paradise insisted, plainly represented the "less intrusive means," *id.* at 15, by which to make the needed promotions within the spirit of the consent decrees (J.A. 59). As the Department explained below, its proposal met "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact," the standard that the consent decrees embodied (J.A. 40, 125-126). And the Department's proposal "reflect[ed] the percentage of blacks to whites who took the Corporal's examination" (J.A. 126), and it was thus in harmony with the remedial objective of proportional promotion that, under the consent decrees, the procedure ultimately adopted was required to implement.

b. It cannot be argued, moreover, that the one-for-one promotion quota was justifiable independently of the consent decrees in order to remedy some Title VII violation. No such violation was found or even suggested by the district court as to promotions at this stage of the proceedings (*i.e.*, after 1979). Although the district court did find that the promotion procedure for corporals proposed by the Department in 1981 had an "adverse impact" within the meaning

of the consent decrees, such a finding would clearly be insufficient, absent a finding that those procedures failed to predict job performance, to establish a "disparate impact" Title VII violation. Indeed, the district court declined to hear evidence on the question of job-relatedness because it considered that question to be irrelevant under the consent decrees.[14] And even if there had been a "disparate impact" Title VII violation, the one-for-one quota ordered by the district court would have been an unjustifiable remedy. First, quota relief of any sort is generally unjustified for a mere "disparate impact" violation, since such a fault does not represent either a violation of the Constitution or the kind of flagrant and egregious discrimination that the Court in *Sheet Metal Workers* strongly suggested was necessary to justify quota relief. See, *e.g.*, slip op. 50. Secondly, even if numerical race-conscious relief were appropriate for a "disparate impact" violation, a one-for-one quota could not possibly be justified here because it greatly exceeded the proportion of minorities that had applied for, or were eligible for, promotion to the rank of corporal. Thus, even if the district court had found a Title VII violation, which it did not do, the Department's proposal to promote four blacks and eleven whites represented the extreme outer limit of any appropriate remedy.

3. In sum, to the extent that the district court in awarding relief to Paradise intended to enforce the Department's compliance with the consent decrees, the court was clearly pursuing a legitimate objective. With respect to this objective, however, the court

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[14] *A fortiori,* there can be no suggestion of a "disparate treatment" Title VII violation as to promotions at this stage of the proceedings (*i.e.*, after 1979).

passed over or failed to consider reasonable, efficacious, and less intrusive means of accomplishing its desired ends. The one-black-for-one-white quota that it adopted thus cannot be said to have been "narrowly tailored" under the second prong of the "strict scrutiny" test, and the quota is for that reason violative of the Constitution's equal protection guarantees.[15]

C. Promotion Quotas Like That Ordered By The District Court Cannot Be Justified As "Catch-Up" Measures Designed To Accelerate The Achievement Of Racial Proportionality Or Balance

The courts below seem to have been pursuing a third purpose as well in sanctioning the challenged promotion quota—to redress the "longstanding racial imbalances in the upper ranks of the Department" (Pet. App. 41a, 62a). Those courts appear to have posited the objective of expediting the promotion of blacks in order to attain more rapidly a desired "balance" of races at each level of the trooper force. The one-for-one quota may thus have been designed as a "catch-up" quota that aimed, not simply to remedy the effects of the Department's past discrimination, but to help bring about the "racial mix" that theoretically would have existed in the upper ranks of the Department if it had never discriminated in hiring at all. But discrimination against innocent white employees for the purpose of expediting attainment

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[15] We have not discussed so far the especially intrusive results that flow from the fact that the quota challenged here is a *promotion* quota, because, even without considering that additional factor, the quota is not a "narrowly tailored" means to the ends discussed in the text. We elaborate below (pages 38-42) the particularly disruptive effects of promotion quotas, and those effects are obviously an additional factor that can be considered whatever the purpose of the quota.

of a "balance" of the races in our view goes beyond a proper remedial purpose and is inconsistent with this Court's decisions in *Wygant* and *Bakke*.

1. We start with the general proposition, which we believe to be noncontroversial, that a mere desire to obtain some preferred degree of racial or gender balance is unacceptable under the Constitution. As Justice Powell concluded in *Bakke*, "Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 438 U.S. at 307.

To be sure, eliminating the "effects" of prior discrimination is a permissible remedial purpose, but the elimination of such effects cannot be equated with the attainment of racial balance. The plurality opinion in *Sheet Metal Workers* stated that "affirmative action may be necessary in order effectively to enforce Title VII" because such measures are required either to remedy violations by a defendant who "has engaged in persistent or egregious discrimination" or "to dissipate the lingering effects of pervasive discrimination" (slip op. 50). At the same time, the plurality emphasized that "race-conscious affirmative measures [should] not be invoked simply to create a racially balanced work force" (*ibid.*; see also *id.* at 52).[16] As Justice Powell said in his concurring opinion, "[A] court may not choose a remedy for the

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[16] The Court in *Sheet Metal Workers* noted the court of appeals' rejection, even in the egregious context there, of a requirement by the district court that one minority apprentice be indentured for every white apprentice. The court of appeals had concluded that a rigid one-for-one hiring quota was not needed to ensure that a sufficient number of nonwhites were selected for the apprenticeship program. See *Sheet Metal Workers*, slip op. 13-14 & n.18.

purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination. A goal is a means, useful in limited circumstances, to assist a court in determining whether discrimination has been eradicated." Slip op. 5 (Powell, J., concurring). See also *id.* at 7 (O'Connor, J., concurring in part and dissenting in part) ("The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance"; a "goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination").

The plurality opinion in *Sheet Metal Workers* thus establishes that there is a clear distinction between the effects of past discrimination and racial imbalance, and that, even as to a flagrant discriminator, only the former may be the object of remedial efforts. The effects of past discrimination that may be addressed by remedial orders include, for instance, those "informal mechanisms [that] obstruct equal employment opportunities" even after "the employer or union formally ceases to engage in discrimination." Slip op. 24. Specifically, the Court identified as "lingering effects" barring equal opportunity such factors as a reputation for discrimination that discourages minority applicants (*id.* at 24, 51, 52) and an "old-boy" network that restricts access and training to those whites who have "informal contacts with union members" (*id.* at 52). But the only permissible purpose of class-based affirmative measures is to "dismantle prior patterns of employment discrimination and to prevent discrimination in the future" (*id.* at 48). See also *id.* at 49 n.46.

In upholding the membership goal at issue in *Sheet Metal Workers*, the plurality also pointed out

(slip op. 52) that the flexible goal involved there was "not being used simply to achieve and maintain racial balance, but rather as a benchmark" to measure efforts to remedy past discrimination. But the one-for-one quota sanctioned by the courts below could not possibly be rationalized as "benchmark" of this sort. There is generally no reason to assume that a nondiscriminatory employer would select blacks (or whites) in *greater* numbers than their availability, and hence any race-conscious numerical relief designed to serve a prophylactic or "benchmark" function must, at a minimum, necessarily be tied to the percentage of minorities in the relevant labor market. See *Sheet Metal Workers*, slip op. 23 (plurality opinion); *id.* at 4 (Powell, J., concurring in part and concurring in the judgment); *id.* at 7 (O'Connor, J., concurring in part and dissenting in part). Here, of course, the one-for-one quota greatly exceeds the percentage of blacks in the relevant labor market—*viz.*, entry-level troopers eligible for promotion—and thus could not be justified as a flexible "benchmark."

2. Even in the school-desegregation context, this Court's decisions demonstrate that a government which has adopted truly race-neutral admissions policies need not assure a particular "racial mix" in order to cure its prior segregation. Those cases establish that the Constitution does not require, either as a matter of substantive right (*e.g.*, *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)), or as a matter of remedy (*Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717, 740-741 (1974); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-25, 31-32 (1971)), any particular degree of racial balance in a state's activities. As the Court wrote in *Swann*, "[t]he constitutional command to desegre-

gate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. Thus, even in the school cases—where insisting on racial balance would not disadvantage any innocent nonminorities, since all school children will receive a public education—racial balance is not required. *A fortiori* here, the Constitution cannot require racial balance at the severe expense of innocent nonminority persons.

The Constitution of course requires that the government refrain from any action intentionally designed to exclude or segregate persons on the basis of race. *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton I*), 433 U.S. 406, 413 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). And the Constitution requires that where, as here, the government has discriminated on the basis of race, it undertake the remedial efforts necessary to eliminate the constitutional violation and the conditions that flow therefrom. *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). See *Dayton I*, 433 U.S. at 417, 420. But since the condition that offends the Constitution is racial discrimination (subtle or otherwise), not the lack of racial balance, the prior constitutional violation is remedied by establishing a system that "exclude[s] no [person] of a racial minority * * *, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. The Constitution thus does not require that the government, in seeking to eradicate the effects of its past discrimination, employ "catch-up" quotas or similar race-conscious steps to accelerate progress toward some preconceived notion of a desirable "racial balance."

In *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), this Court applied similar principles in a context not

far removed from the present case. There, the Court was required to decide what actions were necessary to cure a prior discriminatory admissions policy of 4H Clubs operated by an agency of the State of North Carolina. It was undisputed that there remained a substantial racial imbalance among the Clubs, even though the agency had adopted a nondiscriminatory admissions policy. Slip op. 1 (White, J., for the Court). It was equally clear that this imbalance was traceable, at least in part, to the *de jure* segregated period. The Court nevertheless held that any constitutional or statutory violation was cured when the agency "ha[d] taken affirmative action to change its [segregative] policy and * * * establish[ed] what is concededly a nondiscriminatory admissions system." *Id.* at 3; see also *id.* at 2. Although nothing approaching racial balance had been achieved, the Court concluded that the State had met federal regulatory requirements "to take 'affirmative action' to overcome the effects of prior discrimination in its programs." *Id.* at 3. As the Fifth Circuit wrote in an earlier phase of the instant litigation, "equality of access satisfies the demand of the Constitution." *NAACP* v. *Allen*, 493 F.2d at 621. The Constitution does not require, and in our view should not be interpreted to permit, "catch-up" quotas designed to achieve racial balance.[17]

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[17] Progress toward racial balance in the upper levels of the Alabama Department of Public Safety could be substantially expedited by a variety of race-neutral devices designed to eliminate arguably arbitrary barriers to promotion. For example, the Department's time-in-grade requirement for promotion eligibility could be reduced. And the Department could be ordered to modify its policy of promoting only from within, a modification that would permit it to hire black (or white) troopers laterally for upper-rank positions.

D. The One-For-One Promotion Quota, Whatever Its Purpose, Unnecessarily And Severely Burdens Innocent Persons, And It Therefore Fails To Satisfy Strict Scrutiny

Whatever purpose is offered for the one-for-one promotion quota—whether as a means of coercing compliance with the consent decrees, as a method of allocating the 15 promotions immediately needed, or as a way of attaining racial balance—this quota was not a "narrowly tailored" means of achieving the goal. An extreme one-for-one quota was not necessary to enable blacks to progress with deliberate speed into the upper ranks of the Department. And that quota seriously disadvantaged identified nonminority individuals because of the color of their skin.

1. As we have noted above, the quota challenged here was superimposed upon a bedrock of earlier race-conscious relief—the hiring quota ordered in 1972, and the proportional promotion remedy set forth in the 1979 and 1981 consent decrees—which had already proven, or had the potential to prove, successful in eliminating the effects of past discrimination. The hiring quota had produced by 1983 a racially balanced trooper or "entry-level" force, and the results had begun to manifest themselves in the upper ranks. The district court recognized that new black troopers would initially be clustered in the lower echelons, until they gained sufficient time in grade to earn promotions. *Paradise* v. *Shoemaker*, 470 F. Supp. at 441. Of the ten troopers promoted to corporal after the 1979 consent decree, four were black. For the next set of promotions, the Department proposed to promote four blacks and eleven whites, a proposal that would have raised the percentage of black corporals from 6% to 9.8%. See J.A. 62, 133. The promotion procedures mandated by the consent decrees, which

were in fact implemented shortly after the district court acted, have brought three additional blacks to the rank of corporal and two to the rank of sergeant. See pages 12-13 & note 5, *supra*. As this Court has observed in a somewhat different context, nondiscriminatory hiring and promotion practices ordinarily "will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters* v. *United States*, 431 U.S. at 339-340 n.20. Because the earlier race-conscious relief ordered by the district court and implemented pursuant to the consent decrees had succeeded in remedying the Department's past hiring discrimination and had already made substantial progress in achieving "racial balance," the one-for-one promotion quota was unnecessary no matter how the quota's purpose is characterized.

It is true, of course, that a one-for-one promotion quota may succeed in integrating the upper levels of a work force more rapidly than a nondiscriminatory policy embodying equality of access. But before seeking to advance "racial balance" in this way, a court must consider that such quotas manifest racial discrimination in its least subtle form. When all promotions are allocated on a racial basis—particularly when the basis is one black for every white—promotion decisions inevitably become suspect in the eyes of some. If racial preferences ever stigmatize their beneficiaries—and various members of the Court have recognized that they can and do [18]—then it is pre-

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[18] See *Fullilove* v. *Klutznick*, 448 U.S. at 545, 547 (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting); see also Posner, *The*

cisely such "catch-up" quotas that courts should strive to avoid. Indeed, the risk of stigma will be especially great where it is clear that the quota's high-ranking beneficiaries have received preferential treatment in both hiring *and* promotion.

2. Besides being unnecessary, and perhaps being counterproductive, in remedying the effects of past discrimination, the relief sanctioned below fails "strict scrutiny" because of its exceptional and unwarranted intrusiveness upon the rights of innocent third parties. The district court ordered and the court of appeals approved the most intrusive of all race-conscious remedies—a rigid numerical quota. As Alan Bakke was obviously excluded from competing for 16 out of 100 seats in medical school (see 438 U.S. at 315-316 (opinion of Powell, J.)), application of the quota involved here absolutely excludes white troopers from competing for one out of every two promotions. And while that quota in practice will probably be limited in time and effect, the principle that such quotas are highly disfavored nevertheless applies.

A one-for-one promotion quota does considerable harm to a discrete group of innocent non-minority individuals.[19] To achieve the social good of ending racial discrimination, "innocent persons may be called

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DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 17 & n.35.

[19] The displaced white applicants for promotion cannot be said to have "acquiesced" in any sense. Compare *Fullilove*, 448 U.S. at 479 (opinion of Burger, C.J.) (voluntary recipients of federal funds). See also *Wygant*, slip op. 7 (Stevens, J., dissenting) (ratification of union contract). Nor is it likely that these individuals—many of whom are entry-level troopers hired since 1972, when the Department ended its hiring discrimination—have in the past "reaped competitive benefit" relative to black promotional applicants. *Fullilove*, 448 U.S. at 485 (opinion of Burger, C.J.).

upon to bear some of the burden of the remedy." *Wygant*, slip op. 12 (opinion of Powell, J.). But whether that summons is constitutionally permissible depends in part upon "the diffuseness of the burden" to which nonminorities are subjected. *Sheet Metal Workers*, slip op. 6 n.3 (Powell, J., concurring in part and concurring in the judgment), citing *Wygant*, slip op. 14-15 (opinion of Powell, J.). The loss of one's job, as contrasted with the failure to receive a job offer to begin with, is an unacceptable result of affirmative action in virtually all circumstances. Compare *Firefighters Local Union No. 1784* v. *Stotts* (layoffs), and *Wygant* (layoffs), with *Sheet Metal Workers* (hiring and training), and *Weber* (training). This is in part because a layoff or discharge works a grievous disruption of identifiable individuals' previously settled expectations and is in no sense "diffused" through society as a whole.

The promotion quota involved here, like the layoff remedies that the Court has previously addressed, "impose[s] the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant*, slip op. 14-15 (opinion of Powell, J.). Unlike race-conscious hiring relief, a one-for-one promotion quota casts its onus not on the general public, but on a finite and often rather small number of identifiable individuals whose opportunities for advancement are significantly reduced. Particularly in public service careers, where long tenure and regular advancement are more the rule than the exception, an individual who contemplates or has already invested years in his job has legitimate expectations transcending those of an applicant for an entry-level position.[20] Eligibility for

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[20] Figures compiled by the Bureau of Labor Statistics show that 32% of employees in the "protective service" category—

promotion is a major part of the "equity" in seniority built up by an employee. See *Wygant*, slip op. 14 (opinion of Powell, J.); Fallon & Weiler, Firefighters *v.* Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 58, 60 & n.222, 67. See also *Franks* v. *Bowman Construction Co.*, 424 U.S. 747, 787 (1976) (opinion of Powell, J.) ("consideration for promotion" an element of competitive seniority); *Hishon* v. *King & Spaulding*, 467 U.S. 69, 76-77 (1984) (record reflected that the possibility of being made a partner was a major inducement to accepting employment). The intrusiveness of a one-for-one promotion quota is particularly marked where, as in the instant case, it is coupled with a previously existing hiring quota. For those troopers hired since 1972—and many current applicants for promotion to corporal can be expected to fall within that group—this will be the second time that they have encountered a racial quota, impeding first their access into, and then their advancement through, the Department.[21]

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firefighters, police, prison guards, etc.—have held their jobs for 10 years or more, whereas only 27% of the employed population at large have held their jobs for that length of time. *Current Population Survey* (Jan. 1983) (unpublished compilation). A recent private-sector survey concluded that seniority plays a significant role in both union and nonunion promotions. K. Abraham & J. Medoff, National Bureau of Economic Research, *Years of Service and Probability of Promotion* (1983). And, "[o]n average, black workers now have accumulated seniority roughly equal to that of whites." Fallon & Weiler, Firefighters *v.* Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 65 & n.238.

[21] Although the Fifth Circuit in an earlier stage of this litigation recognized that "[t]he problems inherent in quota relief assume different parameters in the promotion, rather than hiring, context" (*NAACP* v. *Allen*, 493 F.2d at 622 n.12), the Eleventh Circuit below did not address that distinction in sustaining the promotion quota now challenged. Other courts of

We do not mean to suggest that an absolute constitutional line should be drawn between hiring and promotional preferences. All race-conscious remedies are constitutionally suspect, and all must meet the same exacting standards. See *Sheet Metal Workers*,

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appeals, however, have joined the Fifth Circuit in emphasizing the important differences between preferences in hiring and promotion. In reversing a promotion quota in *Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420 (1975), cert. denied, 429 U.S. 823 (1976), the Second Circuit declared that "[s]o long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race." Concluding that the promotion quota represented "constitutionally forbidden reverse discrimination," the court explained that where finite numbers of candidates are competing for promotions,

> We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.
>
> A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed solely because they are white.

520 F.2d at 429 (footnote omitted). See also *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973) (invalidating a promotion quota for ranks above patrolman, reasoning that "the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone"); *United States* v. *City of Chicago*, 663 F.2d 1354, 1361 (7th Cir. 1981). Cf. *Firefighters* v. *Stotts*, 467 U.S. at 579 n.11 (noting that, in the layoff context, "[l]ower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs").

slip op. 6 (Powell, J., concurring in part and concurring in the judgment). But a quota that thrusts its entire burden on a few nonminority individuals, as the one-for-one promotion quota does here, will rarely qualify as "narrowly tailored" to achieve its goal. If nonminority individuals, at each step in their careers, find themselves excluded from employment opportunities because of the color of their skin, "affirmative action" will come to resemble for them the systematic and pervasive discrimination so long and so tragically directed at generations of blacks. "The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF THE ALABAMA DEPARTMENT
OF PUBLIC SAFETY AND COLONEL BYRON
DAVIS FOR DISMISSAL OF PETITIONER

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Public Safety

QUESTIONS PRESENTED

1. Whether the Equal Protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution permits the imposition of a one-black-for-one-white promotional quota without a independent, correlative finding of discrimination.

2. Whether the use of affirmative action in the form of racial preference by the District Court as a means of enforcing the terms of valid consent decrees having a racially neutral objective is permissible under the Equal Protection Clause of the fourteenth Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-999

UNITED STATES OF AMERICA,

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v.

PHILLIP PARADISE, JR., ET AL.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF RESPONDENTS, ALABAMA DEPARTMENT OF PUBLIC SAFETY AND COLONEL BYRON PRESCOTT IN SUPPORT OF PETITIONER

INTEREST OF THE DEPARTMENT OF PUBLIC SAFETY AND BYRON PRESCOTT

The Alabama Department of Public Safety is a governmental agency of the Sate of Alabama and Bryon Prescott is director of the Alabama Department of Public Safety. Both are named as party-defendants in the action below. The challenged promotional quota has been imposed on this entity and has a continuing effect on the Department.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App., pp. 1a-54a) is reported at 767 F.2d 1514. The order reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the Court of Appeals (Pet. App., pp. 80a-81a) was entered on August 12, 1985. This Court granted the petition for writ of certiorari, limited to Question 3 presented by the petition, on July 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE FACTS

This is an employment discrimination case which involves the validity of a one for one (black for white) promotion quota imposed by the district court as a means of enforcing earlier consent decrees in this litigation.

In January 1972, a class action was brought by the National Association for the Advancement for Colored People (NAACP) against the Alabama Department of Public Safety and the Alabama Department of Personnel. Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs and the United States intervened as a party plaintiff.

Initially, the district court determined that the Alabama Department of Public Safety along with the Alabama Department of Personnel had been involved in discrimination in hiring. The court enjoined the Department from engaging in employment practices with the effect of discriminating on the basis of race

or color, and further ordered them to hire one black state trooper for each white state trooper until the number of black troopers in the force was equal to 25% of th total troopers *NAACP v. Allen*, 340 F.Supp. 703 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974). In August of 1975, the court granted additional relief after concluding the Department restricted the number of new troopers hired and the size of the trooper force in order to frustrate the court's 1972 order (See pet. App. 7a-8a). Additional relief was granted by consent decrees in February 1979 (*Id.* at 71a-79a) and in August 1981 (*Id.* at 65a-70a).

The 1979 consent decree involved the issue of promotions. The Departments agreed to "have as an objective . . . an employment and promotion system that is racially neutral" (Pet. App., 72a), and "not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks . . [or] which discriminates on the basis of race in hiring [or] promoting" (*ibid.*) In dealing with promotions, the Department agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal" (*Id.* at 74a). The Department further agreed to develop within one year from the decree, and to submit for the other parties' review and the court's approval, a procedure for corporal promotions conforming with the 1978 *Uniform Guidelines on Employee Selection Procedure*, 43 F. Reg. 38290-38309, and having little or no adverse affect on blacks (Pet. App., 74a-75a). When the validation of the promotion

procedure for corporal promotions was completed, the Department was to start the validation of promotional procedures for sergeants, lieutenants, captains, and majors (*Id.* at 75a). Until the validation was complete, the Department was to use the state merit system for all corporal promotions and to promote at least three black state troopers to the rank of corporal. Detailed procedures were to be followed by agreement between the parties as reflected by the consent decree approved by the district court. In February, 1980, four black troopers and six white troopers were promoted to corporal positions pursuant to the 1979 Consent Decree.

In April 1981 the Department of Public Safety and the Department of Personnel moved for approval of a written examination for the promotion of corporals. paradise and the United States objected contending the use of a test which had not been validated under the *Uniform Guidelines* would not be justified if the results had an adverse impact on black applicants. Whereupon hearings and discovery took place through August 18, 1981 when another consent decree was proposed by all the parties. This second consent decree was approved (Pet. App. 65a - 70a), in which the parties agreed the Corporal examination prepared by the Alabama Department of Personnel would be administered and scored; that the scores would be used with other factors to rank applicants on a promotion register; and that the promotion register would be reviewed "to determine whether the selection procedure has an adverse impact against black applicants either as to the initial group of promotions to be made or as to all of the expected promotions during the life of the register. (*Id.* at 68a). If the procedure for

selection did not adversely impact the blacks, selections were to be made in rank order from the promotion register; if the procedure for selection did adversely impact the blacks, the Department had to use an alternative procedure for promotions to be made" in a manner that does not result in adverse impact for the initial group of promotion or cumulatively during use of the procedure" (*Id.* at 69a). *If the parties agree, or the Court finds, that the selection procedure has an adverse impact, promotions shall be made in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure" (Ibid.)*

On June 2, 1982 the Alabama State Troopers Association moved to intervene and object to enforcement of the consent Decree. On August 4, 1982, the Motion to Intervene was denied.

On April 1983, Paradise filed a "Motion to Enforce" the terms of the 1979 and 1981 consent decrees. They sought an order requiring the Alabama Department of Personnel and Public Safety to promote black troopers to all upper rank positions in equal numbers with white troopers until 25% of each upper level rank is filled by a black or procedures for promotion which follow the consent decrees have been developed.

The United States opposed imposing a one-black-for-one-white promotion quota, but agreed the consent decrees should be enforced. On April 15, 1983, V.E. McClellan and three other white troopers moved to be permitted to intervene on behalf of a class composed of top-ranked white applicants for the corporal promotion. After a hearing the district court permitted intervention by order dated October 28, 1983 on

prospective issues only, but denied intervention as to previously entered orders, judgments, and consent decrees on the ground of untimeliness.

Also on October 28, 1983, the district court entered an order finding the 1981 selection procedure would have an adverse impact on blacks, prohibited its use, and ordered all the parties to submit proposals for promoting at least 15 troopers to corporal in a manner that would not have adverse racial impact. 580 F. Supp. 171 (M. Ala. 1983). The court indicated that it would consider the promotion plans submitted to it for resolution if the parties could not agree on an equitable plan. The Department submitted a plan. (pp. 125-127, Joint Appendix) When the other parties could not agree, the court took the matter under advisement.

On December 15, 1983, the district court issued an order and memorandum opinion granting Paradise's "Motion to Enforce" and the one-black-for-one-white quota relief requested. 585 F. Supp. 72 (Pet. App. 55a-64a). The court entered an order enjoining the Department "from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted"[1] (*Id.* 56a). The Court did not enter an order requiring use of a promotional plan "... that does not result in adverse impact for the initial group ...", as required by the consent decree. In other words, the Court did not devise a promotional plan for use by the Department which did not have adverse racial impact.

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[1] Eight black and eight white troopers were promoted to corporal in keeping with this order.

The Court ordered a plan which adversely impacted on white applicants.

The court also ordered that "this promotion quota should remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the [Department] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal requirements" (*Ibid.*) The court then gave the Department 35 days to submit for the court's approval a schedule for promotional procedures for all ranks above the entry-level rank.[2] (*Ibid.*)

The Alabama Department of Public Safety then filed several motions seeking reconsideration or, in the alternative a stay pending an appeal of the Court's December 15, 1983 order imposing a temporary promitional quota. Oral argument was held on January 5, 1984 but no evidence was permitted. These motions were denied by an opinion and order dated January 13, 1984, after which Notice of Appeal was filed.

On August 12, 1985 the court of appeals affirmed the district court's order imposing the one-black-for-one-white promotion quota. 767 F2d 1514 (Pet. App., 1a-54a). They held that the quota order was not a modification of the 1979 and 1981 consent decrees. It was viewed, rather as a proper means of enforcement of these decrees and necessary to remedy the present racial imbalance in the ranks which the court considered "present effects" of the Department's prior discrimination.

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[2] The Department did submit a schedule for the rank of corporal and sergeant which were approved by the court for use on a temporary basis for a limited number of promotions.

RATIONALE OF COURTS BELOW

In fashioning a procedure the district court on December 15, 1983, recognized that twelve years prior to plaintiff's Motion to Enforce the Consent Decrees the Court condemned racially discriminatory policies and practices in the Department.[3] The Court found that the effects of the Department's prior discrimination remain after 12 years noting that "of the 6 majors, *there is still not one black.* Of the 75 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.*" (Pet. App. 60a) Based on these factual findings the district court concluded "the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons".[4] (*ibid.*) The Court agreed with the plaintiffs that for a period of time 50% of those promoted above entry-level must be black troopers "in light of the severe racial imbalances in the upper ranks." (Pet. App. 60a-61a). It reasoned that the one-black-one-white promotional quota was warranted to "address the department's delay in developing acceptable promotion procedures

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[3] The district court in 1972 found Department had discrimination against blacks in *hiring* only. *NAACP v. Allen*, 340 F.Supp. 703 (M.P. Ala. 1972).

[4] The Court obviously concluded that the findings of discrimination in the Department in its hiring practices some 12 years prior to reaching this conclusion was related in some way to the procedure through which the existing corporals, sergeants, etc., obtained their ranks. The Court related no findings of fact in reaching this conclusion, however.

for all ranks".[5] (Pet. App. 61a). The court further reasoned that since there has been unlawful discrimination the court had the responsibility to fashion race-conscious relief which is "necessary, reasonably and otherwise appropriate under the circumstances" (Pet. App. 62a) to "eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future."[6] (*Ibid.*) Immediate, affirmative, race conscious relief was "clearly necessary" because the "racial imbalances in the upper ranks . . . remains egregious and are now of long duration and because it is apparent the intolerable disparities will not dissipate within the near future." (*Ibid.*)

After the court had taken judicial notice of racial imbalances in the upper ranks of the Department and noting the past discrimination in hiring the court concluded the promotional quotas were "reasonable" and "specifically tailored to redress the continuing effects of past discrimination" noting further that the order met the test prescribed in *United Steelworkers v. Weber*, 443 U.S. 193, (1979), (Pet. App. 63a).

On appeal to the United States Court of Appeals for the Eleventh Circuit, the Department asserted that the one-black-for-one-white promotional quota

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[5] The Court at this point in the opinion appeared to loose sight that according to the 1979 and 1981 consent decrees it was being called upon to assist in approving a promotional procedure which was fair to all having little or no adverse impact upon blacks.

[6] The Court never specifically indicated what discriminatory practices of the Department it was seeking to remedy. It obviously was considering at this point the finding of unlawful discrimination in hiring practices of the Department found in 1972.

constituted a modification of the existing consent decrees without justification by any findings of post decree discrimination or other changed circumstances (Brief of D.P.S. pp. 19-25). it was also argued in brief that the promotional quota imposed by the District Court was unsupported by the evidence and amounted to unconstitutional reverse discrimination in violation of the Fourteenth Amendment of the United States Constitution (Brief of D.P.S., pp. 25-46).

On August 12, 1985, the Eleventh Circuit affirmed the district court's order imposing the fifty percent (50%) promotion quota. 767 F.2d 1514 (Pet. App. 1a-5a). The Court of appeals held the promotional quota imposed did not constitute a modification of the 1979 and 1981 consent decree but rather enforced them reasoning that the consent decrees concerned the impact of proposed promotion procedures "on blacks, and blacks alone," and did not specifically prohibit procedures adversely impacting on white. (*Id.* at 26a).

The opinion of the Eleventh Circuit expressed definite uncertainty, however, as to what standard should be applied with respect to the claim that the promotional quota ordered by the district court violates nonminority rights to equal protection as guaranteed by the Fourteenth Amendment of the United States of Constitution. The Court of Appeals clearly indicated it needs additional guidance from the Supreme Court in order to adequately address this issue. It also expressed concern over the lack of consensus in this Court on the equal protection issues stating "determining what [equal protection reverse discrimination] 'test' will eventually emerge from the court is highly speculative". (Pet. App. 35a).

The Court then reviewed the standards established in three previous decisions, *United States v. City of Alexandria*, 614 F.2d 1358 (5th cir. 1980); *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir.), *cert denied*, ___*U. S.* ___, *105 S.Ct. 220, (1984), and Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert denied*, 454 U.S. 1124, (1981) holding that under the authority of either of these decisions the district court's order does not deprive the intervenors of their right to equal protection.

The Court of Appeals quoted from the opinion in *City of Alexandria*, 614 F.2d 1358, which concluded that "goals and targets are acceptable under the Constitution . . . so long as they are *reasonably related* to the legitimate state goal of achieving *equality* of employment opportunity." (*id.* at 1363) (footnote omitted) (emphasis added). The opinion defined the "*reasonableness*" requirement by taking three factors into account: (1) whether the remedial relief is temporary and will terminate when the manifest [racial] imbalances have been eliminated;" (2) whether the relief establishes "an absolute bar to the advancement of white[s]"; and (3) whether the relief will benefit only "qualified" persons. (*Id.* at 1366), (Pet. app. 36a-37a).

In *South Florida Chapter*, 723 F.2d 846, the Eleventh Circuit, recognizing the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action interpreted the common concerns in the decisions of *Regents of the University of California v. Bakke*, 438 U.S. 265, (1978) and *Fullilove v. Klutznick*, 448 U.S. 448, (1980), concluding the employment of benign racial classifications to be

constitutionally permissible if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classification extends no further than the demonstrated need of remedying the present effects of the past discrimination. (*Id.* at 851-852). The Court in *South Florida Chapter* viewed the approach as an attempt "to balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be 'narrowly tailored' to the legislative goals so as to not unfairly infringe upon the rights of third parties." (*Id.* at 852) (Pet. App. 37a-38a). Finally, *Valentine*, 654 F.2d at 510, utilized *a substantially related to a legitimate state interest* test stating further that race-conscious affirmative action is *substantially related* to remedying past discrimination if "(1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interest. (*Id.* at 510) (Pet. App. 38a-39a).

The Court of Appeals based on the standards just mentioned in *City of Alexandria*, *South Florida Chapter*, and *Valentine* held that the quota order of the

district court does not violate the Equal Protection Clause.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has limited the review of the Petition for Certiorari to the issue of whether the one-black-for-one-white promotion quota is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.

Even though Title VII is not the central issue before this Court, the statute cannot be ignored because it it here in which is found the authority for the courts to award affirmative race-conscious relief. The Eleventh Circuit expressed its concern over the speculation which was going to be required to resolve the equal protection issue. To be sure, Respondent has found no decisions involving *court ordered* affirmative action in public employment in which Equal Protection was the dispositive issue, most challenges being based on the scope of authority contained in 706(g) of Title VII, 42 U.S.C. 2000e-5, leading to judicially determined limitations and policy considerations which must be exercised when any affirmative action is contemplated. To this end, this court is now called upon to articulate the specific limitations which the equal protection guarantees of the Fourteenth and Fifth Amendments place on the form and effect of court ordered relief permitted under Title VII.

Any court which seeks to remedy employment discrimination by creating racially preferenced, affirmative action in the form of quota relief finds its

remedial authority in 706(g) Title VII, Civil rights Act of 1964. Specifically this section states:

> "If the court finds that the respondent has *intentionally* engaged in or is intentionally engaging in an *unlawful employment practice* charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action as may be appropriate* . . ." (emphasis added)

Emphasis is added because it is precisely these words in the statute which are most important when it becomes necessary to scrutinize affirmative action which impinges on the rights of innocent nonminorities. As will be discussed, in Equal Protection analysis, the limitations on the authority given courts pursuant to 706(g) is of considerable importance because these limitations serve the purpose of protecting the interest of those who must bear the sacrifice any time affirmative action in the form of quota relief is awarded.

Pursuant to 706(g) of title VII the district court below has invoked its authority to order affirmative race-conscious relief at a time when no remedy for intentional discrimination was warranted. It has without valid justification utilized race as the means of *enforcement* of consent decrees having racially neutral purposes. Whats worse, when called upon to assist in fashioning a promotional procedure which is "fair to all applicants" the court has seen fit to order promotion of objectively less qualified individuals over others simply because of their race. Such a casual waving aside of fundamental Fourteenth Amendment

rights of individual members of one race was seemingly justified by a need to correct an obvious imbalance in the ranks of members of the other race.

This distorted logic used by the Court of Appeals to uphold the actions of the district court can be traced to a wholly unwarranted connection of drawn by that court between the court's 14 year old finding of discrimination in hiring and present statistical underrepresentation of minorities in the higher ranks of the Department. Not a single promotion, however, awarded the individuals members of the preferred race under the courts order was at any time found to be denied those individuals by any actions attributable to the Department. Therefore, it is beyond all logic that the racial preferences ordered by the court can by justified under the guise of remedying present effects of the department's discriminatory acts. Without such justification no purpose or objective of the court can be so overriding as to overwhelm the equal protection guarantees belonging to the innocent nonminorities that necessarily must be sacrificed or at least set aside in the name of affirmative action.

Under the strictest of scrutiny and most exacting standards which all racial classification appropriately demand in equal protection analysis the quota relief awarding promotions on the basis of race alone cannot be countenanced.

ARGUMENT

COURT ORDERED RACE CONSCIOUS QUOTA RELIEF IN THE PRESENT CASE IS IMPERMISSIBLE UNDER THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AND FIFTH AMENDMENTS

I. STRICT SCRUTINY IS THE ONLY STANDARD OF REVIEW APPLICABLE TO DETERMINE WHETHER COURT ORDERED RACE CONSCIOUS RELIEF IS CONSTITUTIONAL.

The Equal Protection clause of the Fourteenth Amendment requires equal treatment of all persons under the law stating in pertinent part "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The equal protection guarantees of the Constitution belong to *all persons* regardless of race, color, creed, nationality or sex. "Distinctions between citizens solely because of their ancestry [are] 'odious to a free people whose institutions are founded upon the doctrine of equality'". *Fullilove v. Klutznick,* 448 U.S. 448, 497, (1980) (concurring opinion of Powell, J.); quoting *Loving v. Virginia,* 388 U.S. 1, 11, (1967), quoting *Hirabayaski v. United States,* 320 U.S. 81, 100, (1943). Such "racial and ethnic distinctions . . . are inherently suspect and thus called for the most exacting judicial examination." *Regents of University of California v. Bakke,* 438 U.S. 265, 291, (1978). For these reasons, "'it is . . . firmly settled that any racial classification emanating from [state action]', *Loving v. Virginia, supra,* 388 U.S. at 10, 'carries the heaviest possible presumption of unconstitutionality'".

The one-for-one promotional quota imposed by the district court explicitly classifies the employees of the Alabama Department of Public Safety along racial

lines inherently raising issues of reverse discrimination. Because this relief awards promotion to individuals based on racial criteria, such racial preference "must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees". *Fullilove v. Klutznick, supra,* 448 U.S. at 491. According to Justice Powell concurring in the *Fullilove* opinion, these "[r]acial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision". (*Id.* at 496).

The Court of Appeals for the Eleventh Circuit, however, employed a much lesser standard in reviewing the appellants equal protection challenge of the district court's imposition of a promotional quota.

The eleventh circuit appeared to justify the district court's action primarily on the authority of *South Florida Chapter, supra,* in which it articulated its perception of this Court's common concerns in the fragmented opinions expressed in *Bakke* and *Fullilove:* (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. (*Id.* at 851-852). In accepting these perameters as the appropriate "test" to apply to an equal protection challenge of an affirmative action plan, the Eleventh Circuit in *South Florida Chapter* specifically

rejected the district court's conclusion that strict scrutiny was the proper standard. In applying this "test" . . . to the facts of the present case, it is obvious the courts rejected strict scrutiny standard of review. It cannot be denied, however, applying anything less than "strict scrutiny" is clearly erroneous.

This conclusion is verified by this Court's recent decision in *Wygant v. Jackson Board of Education*, . U.S. ___, 106 S.Ct. 1842, 91986) which was decided on equal protection grounds. Inasmuch as the petitioners in that case challenged the constitutionality of racial preferences in a collective-bargaining agreement rather than court ordered racial preferences, the limitations and policy considerations important in *Wygant* are different from those presented here. Nevertheless, the constitutional standard applicable in *Wygant* is equally applicable to the petitioner's present equal protection challenge. According to Justice O'Connor, concurring specially:

> "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable to individual members of the court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change." (*Id.*, at 1853); quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, n.9, (1982).

The majority in *Wygant* specifically "recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental

discrimination." (*id.* at 1846). Thus, the constitutional standard applicable to all equal protection challenges are the same.

According to *Wygant*, judicial review of any racial preference or classification must necessarily involve a "most searching examination to make sure that it does not conflict with constitutional guarantees". (Ibid). quoting *Fullilove v. Klutznick, supra*, 448 U.S. at 491, (1980) (opinion of BURGER, C.J.). This examination according to this Court involves two prongs.

> First, any racial classification 'must be justified by a compelling governmental interest'. *Palmore v. Sidoti*, 466 U.S. 429, 432, (1984); See *Loving v Virginia*, 388 U.S. 1, 11, (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'. *Fullilove*, 448 U.S., at 480.

Wygant, supra, at 1846. The court ordered racial preferences in the present case must unquestionably be examined under strict scrutiny. Furthermore, the judicial determination to be made in the present case is whether the promotional quota ordered by the district court below is "supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." (*Id.* at 1847). The court below failed to make this determination applying a "reasonableness" standard. For this reason the decision must be reversed.

II. THE PROMOTION QUOTA ORDERED BY THE COURT CANNOT PASS STRICT SCRUTINY

What facts or circumstances need be demonstrated for a court to order one individual promotion over

another solely on the basis of race without such an order violating the equal protection provisions of the Constitution?

To properly scrutinize the constitutionality of court ordered affirmative action which incorporates racial preferences, analysis must necessarily begin by focusing on the objective the court seeks to achieve. This is true because *no classification based on race can be justified unless it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.* See eg. *Bakke, supra,* 438 U.S., at 290-306. Thus, any racial preference ordered by a district court pursuant to its statutory authority under 706(g), 42 U.S.C. 2000e-5, must by necessity further a purpose which is "compelling" before such racial preference can pass constitutional muster.

The concurring opinion of Justice Powell in *Fullilove* defined the appropriate criteria for determining a legitimate interest in the context of race-conscious remedial relief in the following manner:

> Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. *First,* the governmental body that attempts to impose a race-conscious remedy must have the au-

> thority to act in response to identified discrimination. c.f. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103. (1976). *Second,* the governmental body must make findings that demonstrate the existence of illegal discrimination. (*Id.* at 499). (1980).

The majority in *Bakke,* stated the criteria thusly:

> Before relying on . . . findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is *responsive to identified discrimination* (citations omitted) (*Id,* 438 U.S., at 309, (1978).

Wygant indicated it another way:

> In particular, a public employer must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. *Id.* ___U.S. ___, 106 S.Ct. 1848.

While "guarantee of equal protection" was a common issue in *Fullilove, Bakke,* and *Wygant* none of these cases involved judicial review of court ordered affirmative action. *Fullilove* involved a Congressional Act requiring preferences for minorities in local public work projects.[7] Whereas, in *Bakke,* white males challenged an admissions program adopted by a state ent-

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[7] In *Fullilove,* the Court consistently stressed the scope of review was limited because they were reviewing not the remedial decree of a court but rather the legislative authority of congress noting "Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudications it must remembered that 'Congress may paint with a much broader brush than may this Court.'"

ity which reserved certain positions for "disadvantaged" minority students. In *Wygant* nonminority school teachers contested the validity of a provision in a collective bargaining agreement between a teachers union and a county school board under which preferential protection against layoffs was extended to minority employees.

If Congressional acts, state university admission regulations, and union-county labor agreements which incorporate race-conscious preferences are violative of the equal protection clause if there is not identified racial discrimination, then it would certainly seem to follow that a court order imposing promotions based on race would be subject to at least the same, if not a higher, test.

Applying this criteria to the facts of the instant case under strict scrutiny there is no "compelling" justification for ordering race-conscious affirmative action without making the most exact determination possible that discrimination exists. The Equal Protection Clause of the Fourteenth Amendment demands that before a district court invokes its equitable remedial authority under 706(g) of Title VII awarding racial preference to minority public employees at the expense of innocent nonminorities that court must make the most exact finding possible of specific, identifiable discrimination.

The last sentence of 706(g) limits the authority of the courts. It states: "no order of the court shall require the . . . promotion of an individual as an employee . . . if such individual was refused . . . advancement . . . for any reason other than discrimination on account of race." Thus, without

finding specific, identifiable discrimination a district court has no authority to order a race-conscious remedy, and no "compelling" governmental purpose exists to constitutionally permit such action.

The Court of Appeals speculated on appropriate standard it felt would be most applicable to the nonminority's equal protection claim. It decided the "reasonableness" standard was most applicable. This standard, according to the Court, allow employment of racial classifications and goals to remedy the present effects of past discrimination. The applicability of these standards, however, assume "adequate findings have been made to ensure that the affirmative action is remedying the present effects of past discrimination." *South Florida Chapter, supra,* (Pet. Ap. 37a). To be sure, Justice O'Connor, concurring in *Wygant,* expressed a concensus among this Court that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." (*Id,* at 1853). The same opinion, however, also stated: ". . . remedying 'societal' discrimination, that is, discrimination [racial disparities] not traceable to [the actor's] own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny". (*Id,* at 1854).

The opinions of the courts below strongly indicate the quota relief ordered was to correct racial imbalance rather than to remedy actual effects of past discrimination. The district court remarked that out "of the 6 majors, there is still not one blacks. Of the 25 captains, there is still not one black. Of the 35 lieutenants, there is still not one black. Of the 65 sergeants, there is still not one black. And of the 66

corporals, only four are black." (Pet. App. 60a). Thus, "[i]n light of the severe racial imbalance in the upper ranks, the [district] court agrees . . . at least 50% of all those promoted to corporal and above must be black troopers". (Pet. App. 60a-61a). The eleventh Circuit agreed that the district court's order would "accomplish the objective of remedying the 'egregious' and long-standing racial imbalances in the upper ranks of the Department. (Pet. App. 41a) and was "designed only 'to eliminate a manifest and chronic racial imbalance' caused by the Department's conduct." (*Ibid.*) The court reasoned that in light of the manifest racial imbalance, due regard given to the history of discrimination in the Department, it had not only the power but the duty to impose affirmative race-conscious promotional quotas to remedy the "intolerable disparities." The one-for-one promotional quota according to the district court was "necessary, reasonable, and appropriate under the circumstances" to correct the present racial imbalance in the ranks.

However, there was never a finding by the district court that the Department's promotional procedures or lack thereof constituted racial discrimination.

In the present case, the District Court on February 10, 1972, found within the Alabama Department of Public Safety "a pattern and practice of discrimination in *hiring*." *NAACP v. Allen*, 340 F.Supp. 703-705 (1972); a one-for-one hiring quota was imposed in that court order. *Id.*, 340 F.Supp. at 706; in a later order defining the perameters of the hiring quota, the District Court specifically stated that the court was not imposing a promotional quota. The twenty-five percent (25%) hiring quota had been designed as "an

impetus to promote blacks." *Paradise v. Shoemaker,* 470 F.Supp. 439, 442 (M.D. N.D. Ala. 1979). There has never been a judicial finding of purposeful discrimination in promotions, or an admission of such. Neither has there ever been a judicial determination that the racial disparity among the ranks were related in any way to the findings of discrimination in *hiring* in 1972. This particular history of discrimination in hiring along with the existence of "*severe racial imbalance*", however, was obviously considered by the Court of Appeals as sufficient criteria to impose the one-to-one promotional quota in order to remedy the present effects of the Department's past discrimination. The Department of Public Safety's repeated request for an opportunity to introduce evidence to support a contrary finding was denied by the district court. The Department of Public Safety was denied the right to show the reasons why acceptable procedures for promotion to corporal had not been adopted or presented. It is always important to remember no promotions had been made, black or white, during the period in question.

The line of demarcation with respect to when racial or ethnic criteria *imposed by the Courts* unconstitutionally trammel s the rights of nonminorities remains undetermined. This court has stated however, "racial classifications are simply too percunious to permit any but the most exact connection between justification and classifications". *Regents of University of California v. Bakke,* 438 U.S. 265, 291, (1978) (opinion of POWELL, J., joined by WHITE, J.) Furthermore, it is well established that for remedial relief which "contains race-conscious relief affecting third parties, some well substantiated claim of racial discrimination

against the plaintiff class is necessary 'to ensure that new forms of invidious discrimination are not approved in the guise of [race-conscious remedies].'" *Kirkland v. New York St. Department of Correctional Services*, 711 F.2d 1117, 1130 (2d. Cir. 1983), *quoting, Setser v. Novak Investment Company*, 657 F.2d 962, 968 (8th Cir. 1981) (en banc) See e.g., *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, (1982).

It cannot be denied that the existence of illegal discrimination justifies the imposition of a remedy that will ameliorate the disabling effects of identified discrimination. Such relief will necessarily "make person whole for injuries suffered on account of unlawful . . . discrimination." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The critical inquiry, however, is whether the relief ordered is directed at redressing such discrimination. In the present case nothing whatsoever about the Department's past discrimination in *hiring* was shown to have any disabling effect on promotions to members of the plaintiff class. There are many reasons other than discrimination for the racial imbalances in the ranks of the Department. Under the guise of remedying the "present-effects-of-past-discrimination" both courts below approved the existing racial imbalance in the ranks as criteria for ordering the 50% promotional quota. Such justification is erroneous.

This court has recently expressed its disapproval in the use of "societal discrimination" as justification for affirmative action based on race:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially

> classified remedy. . . There are numerous explanations for a disparity between the percentage[s]. . ., many of them completely unrelated to discrimination of any kind. [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, 1846 (1986).

Inasmuch as the facts of the present case involve a undisputed finding of discrimination in hiring within the Department almost fourteen years ago any discussion about the use of societal discrimination as the sole criteria for race-conscious relief would appear irrelevant. The relevance becomes evident, however, when it is understood that the promotional quota ordered by the court bears no relationship to the harm caused by prior discriminatory hiring practices. According to *Wygant*, "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." (*Ibid.*)

"Where a racial imbalance is unrelated to discrimination, 703(j) [and the equal protection clause with respect to public employees][8] recognizes that no justification exists for ordering that preference be given to anyone on accoun. of this race". *Rios v. Enterprise Ass'n*

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[8] *See Local No. 93 v. City of Cleveland*, ___ U.S. ___, 106 S.Ct. 3063, 3073, n.8 (1986).

Steamfitters, 501 F.2d 622 (1974).[9] Furthermore, no case upholds any purported right of minorities to secure "proportional representation" in a given rank where only a limited number of positions are available and where a performance test is the determining factor as to who attains these positions.

In this case, the court in keeping with the consent decrees was called upon to facilitate the implementation of racial neutral employment procedures which utilize objective, job related criteria for purposes of awarding an individual on merit. Instead, the court erroneously invoked its equitable authority to order promotions to individuals on the basis of race under the guise of remedying the effects of discrimination. On the record, there is no showing of any sort that the criteria used for promotions in the Department of Public Safety or the procedures developed by the Department of Personnel are not probative of qualification and operate or have operated so as to discriminate against certain racial or ethnic groups making up the plaintiff's class. There was no hearing

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[9] In *Rios* the 2nd Circuit determined § 703(j) does not prohibit the use of goals to eradicate the effects of past discriminatory practices but is intended to bar preferential quota relief as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct. *Rios*, which held the subject quota order in *hiring* did not violate § 703(j), is distinguishable from the case at bar because the court there made an exact determination that the imbalance was directly caused by past discriminatory practice. The *hiring quota* in that case remedied a history of *de facto* discrimination in union admissions found previously. In the present case, the promotional quotas ordered by the court to remedy the racial imbalance in the ranks bear no relationship to the unlawful hiring practices of the Department 14 years ago.

designed to determine whether there was any evidence or racial discrimination in promotion.

The rationale of the court below justifying use of the one-black-for-one-white promotional quota to correct the "intolerable [racial] disparities" in the ranks appears to contemplate a "substantive constitutional right [to a] particular degree of racial balance or mixing" which this court has expressly disapproved in *Swann v. Charlotee-Mecklenburg Board of Education,* 402 U.S. 1, 24, (1971). *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 484. (1976). The promotional quota ordered by the district court which denies more qualified individuals their equal chance for promotion did not satisfy even the test of "rational relationship" to permissible state objective as articulated in *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), let alone satisfy the test of "compelling state interest.".

Even if the objective which the district court sought to achieve by the affirmative action order meets the exacting standards required to uphold the validity of a racial classification insofar as remedying the effects of prior discrimination establishes a compelling governmental interest, this does not mean the court ordered promotion quota was *proper* under the circumstances. The court should order affirmative action only when such relief is *appropriate.* "A court must *balance the various equities* between the parties and decide upon a result which is *consistent with the purposes* of the Equal Employment Opportunities Act, and the *fundamental concepts of fairness*". (emphasis added) *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972). This policy consideration was recently emphasized in *Local 28 Sheet*

MetalWorkers' International Assoc. v. EEOC, et al., (slip opinion), No. 84-1656, July 2, 1986:

> Although we conclude that 706(g) does not foreclose a district court from instituting some sorts of racial preferences where necessary to remedy past discrimination, we do not mean to suggest that such relief is always proper. While the fashioning of "appropriate" remedies for a particular Title VII violation [assuming there is one] invokes the 'equitable discretion of the district courts', we emphasize that a courts judgment should be guided by sound legal principles. In particular, they should exercise its discretion with an eye towards congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." (*Id.* at 50); quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770.

Many equitable considerations relevant in the present case indicate that the district court's one-black-for-one-white promotional quota was improper. Specifically it conflicts with compelling governmental interests of the Department and contravenes the purpose of Title VII itself, the very statute it is authorized to enforce.

As previously discussed, the last sentence of 706(g) states that no order of the court can require the promotion of an employee if it was denied for reasons other than discrimination. Thus, the Equal Protection Clause demands under the strict scrutiny standard of review the court to make the most exacting deter-

mination that discrimination persists before affirmative action is warranted. According to *Wygant*, "unless such a determination is made, an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination." (*Id*, at 1848-1849). Such a determination requires the judicial consideration and elimination of other possible reasons for the alleged discrimination for which relief is sought.

The only evidence before the court when it ordered the promotional quota was the test results which indicated if used in rank order would violate the four-fifths rule indicating that the test had an adverse impact. "But [this court has never] embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239, (1976). At best the statistical data established a prima-facie case creating an inference of discrimination. Once the plaintiff has met his initial burden of proof, however, the defendant is entitled to an opportunity to rebut plaintiff's prima facie case. *International Bro. of Teamsters v. United States*. 431 U.S. 324, (1977). *Harris v. Birmingham Board of Education*, 712 F.2d 377 (11th Cir. 1983). Respondents in the case *sub judice* requested an evidentiary hearing in this regard, but were denied their opportunity to introduce any evidence. The court ordered the promotional quota in total disregard of the possibility plaintiff's prima facie case could be rebutted.

The denial of a hearing requires reversal and remand, since, "[respondents] must . . . be afforded a fair opportunity to show [no Title VII violation existed]". *McDonald-Douglas Corporation v. Green*, 411 U.D. 792 at 804.

The one-for-one promotional quota unquestionably operates against innocent nonminorities and in favor of blacks. The order has the effect of depriving more qualified applicants of their right to promotion while promoting others on the basis of their race. Such actions are repugnant to the Constitution in that the best qualified are treated unequally to others less qualified and are denied equal protection of the laws.

Inasmuch as a finding of adverse racial impact may have violated a policy provision of the consent decrees in this case, respondents submit that this alone does not justify such a drastic remedy as a one-black-for-one-white promotional quota. At the most, an injunction preventing the use of this procedure may have been warranted.

The imposition of such racial preferences at this juncture without a finding of intentional discrimination not only violates the Equal Protection guarantees of nonminorities but such relief is in direct contradiction of the statutory purpose of Title VII.

Title VII was designed by congress to achieve equality of employment opportunities. While Congress did not appear to dwell at length on the matter of the applicability of Title VII to white persons, virtually every time the question was raised, the answer emphasized the Civil Rights Act prohibits all racial discrimination. One particular example can be found in Senator Williams' remarks responding to the charge

that the Act seemed to compel an employer to grant preferential treatment to minorities:

> "Those opposed to H.R. 7152 should realize that to hire [or promote] a negro solely because he is a negro is racial discrimination, just as much as a 'white only employment policy'. Both forms of discrimination are prohibited by Title VII of this Act. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the negro, at the expense of the white majority. But how can the language of equality favor one race over another? Equality can have only one meaning, and that meaning is self evident to reasonable men".

Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office. (1969) p. 3189.

III. THE COURT ORDERED QUOTA RELIEF CONTRAVENES OTHER COMPELLING GOVERNMENTAL INTERESTS

Inasmuch as the Court of Appeals applied a "reasonableness" standard to test the validity of the means chosen by the district court to *enforce* the consent decrees, the decision below must be reversed because "that standard has no support in the decisions of this Court". *Wygant*, at 1849. "Under strict scrutiny the means chosen to accomplish the State's

asserted purpose must be specifically and narrowly framed to accomplish that purpose". (Id. at 1850).

The one-black-for-one-white promotional quota ordered by the district court appears to totally disregard the purpose of the consent decrees entered into between the parties. Respondents respectfully submit at the time the court ordered the challenged racial preference the most *compelling governmental need* was a racially neutral promotion procedure. Thus, quota relief purportedly fashioned by the court to "address the delay in developing acceptable promotional procedures for all ranks" (Pet. App. 61a) was most inappropriate under the circumstances especially considering no promotions, white or black, had been awarded except pursuant to the consent decrees.

The order of the court also bears no relationship to the goal of the parties which is to devise procedures "fair to all". Actually it frustrates the purpose of the consent decrees and contravenes the preferred means of achieving the objectives of Title VII and the Constitution. See e.g., *Local Number 93, International Association of Firefighters v. City of Cleveland*, Slip opinion, No. 84-1999, July 2, 1986. Neither does the order reflect the good faith efforts made by the Department to accomplish the consent decree objectives.

The Department of Public Safety and the Department of Personnel had no opportunity to offer evidence justifying the delay. Under the Consent Decrees the defendants had agreed to devise promotional procedures which complied with the four-fifths rule, a much more stringent standard than normally required of public or private employers. The difficulty involved in designing such procedures was never permitted to be

illustrated to the district court. The Department of Public Safety was not even permitted to show that the Department of Personnel was the only state agency equipped to design promotional procedures from a staffing standpoint and under the provisions of the Alabama Employees Merit System Act. In summary, efforts to comply with the consent decrees were considered irrelevant. Now compliance has been achieved at all promotional levels to which blacks are eligible for promotion.

Wygant so aptly noted that public employers must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed distinctions based on race." (*Id,* 1848); *quoting Palmore v. Sidoti,* 466 U.S., at 432, 104 S.Ct., at 1881-1882. To this end, the parties in this dispute had executed voluntary consent decrees having as their objective the utilization of a promotion procedure which is "fair to all applicants". The agreement consisted of the racially neutral purpose to implement a method assuring equality in the Department's promotion procedures. The district court was called upon to facilitate this purpose. Instead, the court interjected race as the means to "enforce" the consent decrees. The promotions awarded solely on account of trace contradict the very purpose of Title VII and likewise, frustrate the purpose of the parties' consent decrees and the compelling governmental interest of the Department. It is respectfully submitted such action by the court cannot be countenanced under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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(6)

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CLERK

No. 85-999

IN THE

Supreme Court Of The United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner

vs.

PHILLIP PARADISE, JR., et al
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF INTERVENORS-RESPONDENTS SUPPORTING THE PETITIONER

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QUESTIONS PRESENTED

I. Whether the one-black-for-one-white promotion quota imposed by the District Court for all ranks within the Alabama Department of Public Safety, including the rank of corporal, is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.

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No. 85-999

IN THE

Supreme Court Of The United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner

vs.

PHILLIP PARADISE, JR., et al
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF INTERVENORS-RESPONDENTS SUPPORTING THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this certiorari is based appears in 767 F. 2d 1514 (11th Cir. 1985) and is included in the Petition for a Writ of Certiorari in Appendix A, at pp. 1a-54a. The Order and Memorandum Opinion of the District Court appear at 585 F. Supp. 72 (M.D. Ala. 1983) and is included in the Petition for a Writ of Certiorari in Appendices B and C, at pp. 55a-64a.

GROUNDS OF JURISDICTION OF SUPREME COURT

The judgment of the Court of Appeals was entered on August 12, 1985. On November 5, 1985, Justice Powell extended the time to petition for certiorari to and including December 10, 1985. On July 7, 1986, this Court entered an Order granting the Petition for a Writ of Certiorari as to question three presented by that petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In February of 1972, the District Court entered the first of many orders in this employment discrimination suit originally brought by the NAACP as a class action against the Alabama Department of Public Safety. In that Order, which is reported as *NAACP vs. Allen*, 340 F. Supp. 703 (N.D. Ala. 1972), aff'd 493 F. 2d 614 (5th Cir. 1974), the District Court enjoined the then director of the Alabama Department of Public Safety and the director of the Alabama Personnel Department from engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention or any other personnel action for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the grounds of race or color. Moreover, the District Court further ordered that one black trooper be hired for each white trooper until approximately 25 per cent of the Alabama State Trooper force was comprised of blacks. Significantly, this Order prohibited discrimination against *any employee* on the grounds of race or color and therefore would not be limited in its application to the protection of the rights of black employees only on the basis of race or color.

From 1972 through 1981, two Consent Decrees were entered. The first was a partial Consent Decree which was approved by the District Court on February 16, 1979. (J.A. pp. 37-45). In this decree, the Alabama Department of Public Safety (hereinafter referred to as the "department") agreed not to engage in any practice or act which discriminated on the basis of race in promoting. The department further agreed to utilize a promotion procedure which was fair to all applicants and which when used either for screening or ranking would have little or no adverse impact upon blacks seeking promotion to corporal and to have as an objective an employment and promotion system that was *racially neutral*.

The department, therefore, agreed to develop for the position of corporal a promotion procedure which would be de-

veloped no later than a year from the execution of this decree. After completing the steps required by the decree involving a promotional procedure for corporal, the department was then to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major. (J.A. p. 41).

The second decree was entered on August 18, 1981. (J.A. pp. 49-54). This Consent Decree was a result of an attempt by the department to have approved a test for promotion to corporal. This decree provided a procedure for the implementation of the department's proposed test for selecting corporals in conformity with the 1979 decree.

In this decree, it was agreed that the list of candidates for corporal promotions would be reviewed to determine whether the selection procedure in use had an adverse impact against blacks in accordance with the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290. If the selection procedure had no adverse impact, selections would be made in rank order from the appropriate register; if the parties agreed or the District Court found that the selection procedure did have an adverse impact, promotion would be made in a manner that did not result in adverse impact for the initial group of promotions or accumulatively during the use of the procedure. If the parties could not agree on the method for making promotions the matter was to be submitted to the Court for resolution. If the parties could not agree upon a procedure to be used after the first administration of any selection procedure and the method of using that procedure, the matter would again be submitted to the Court for resolution. (J.A. pp. 49-54).

On April 7, 1983, Paradise filed a motion to enforce the terms of the previously entered Consent Decrees. Apparently this motion was prompted by the results of a corporal examination which had been given subsequent to the 1981 decree. This examination had been administered to 262 persons, 202 of whom were white and 60 of whom were black. The highest ranked black person based on the selection procedure held the

eightieth place on the list of rankings. In moving for this enforcement, Paradise sought relief whereby there would be the immediate promotion of 18 to 20 employees to the corporal position, depending on need, on a one-to-one basis and for the department to develop and implement a valid promotional procedure for the corporal position within one year and for the positions of sergeant, lieutenant, captain and major within two years.

In April of 1983, the Intervenors filed their Motion to Intervene. By order dated April 18, 1983, the District Court set this motion for submission *without oral argument* and directed the Intervenors to file any brief and any evidentiary materials. The Intervenors submitted affidavits concerning their right to intervene and also filed a motion for an evidentiary hearing or in the alternative a request for oral argument. This motion was denied in part and granted in part in that the Intervenors were allowed the opportunity to be orally heard but not the opportunity for an evidentiary hearing. Further, in this order, the District Court provided that oral argument would be on the same day that the Court would hear argument on Paradise's Motion to Enforce the Consent Decree. The problems and difficulties with the District Court's order disallowing an evidentiary hearing but granting oral argument on both the Motion to Intervene and the Motion to Enforce the Consent Decree on the same day were embodied in a written objection filed by the Intervenors. In that objection, the Intervenors argued that they were prejudiced by not having the opportunity for an evidentiary hearing and having to present oral argument on both motions on the same day. The substance of their objection was that (1) assuming intervention was granted in any manner, the simultaneous setting of the motions totally prevented the Intervenors from challenging the relief sought in Paradise's motion by way of introduction of testimony, expert or otherwise, and further prevented the Intervenors from properly making a record in this case concerning the relief sought (2) in order to properly and adequately respond to Paradise's motion, the Intervenors would need time to conduct discovery and present

whatever testimony they deemed necessary. The timing of the District Court Order resulted in there only being 24 days before the oral argument was scheduled and therefore the Intervenors were prevented and deprived of the opportunity of gathering evidence and conducting discovery, this being the only reliable means, in the event intervention was granted, to respond to Paradise's motion.

On October 28, 1983, some five months after the hearing on the motions described above, the District Court entered two orders. One order granted the Motion to Intervene to the extent that the Intervenors could participate on a prospective basis only and could not challenge previously entered orders, judgments and decrees since intervention, as found by the District Court, was untimely as to these. (J.A. p. 116). The second order entered by the District Court that day found that the department's selection procedure for promotion to corporal, which had been administered in 1981, had an adverse racial impact on blacks and therefore could not be used for promotion purposes. Consequently, the Court ordered the department to file a plan with the Court to promote to corporal, from qualified candidates, at least 15 persons in a manner that would not have an adverse racial impact. (J.A. pp. 117-124). This order was entered on the basis, presumably, of various papers that had been filed by the parties and the oral argument conducted on May 27, 1983. This order was not based on any evidentiary matter, whether that be testimony, documentary evidence or otherwise. Since the Intervenors had objected to the relief sought by Paradise, that is one-for-one promotion, the entry of this order, and the concomitant denial to the Intervenors of the right to conduct discovery or present any evidence, seriously prejudiced their future employment opportunities.

In response to the District Court's Order of October 28, 1983, the department filed a proposed promotion procedure which was objected to by the other parties, the Intervenors specifically objecting to this procedure contending, *inter alia*, that such a procedure amounted to the imposition of promo-

tional quotas in violation of their constitutional rights and because the procedure itself was in compliance with Consent Decrees which the Intervenors claimed were unconstitutional. (J.A. pp. 125-127).

On December 15, 1983, the District Court issued an order and memorandum opinion granting Paradise's Motion to Enforce and the relief requested therein. (J.A. pp. 128-137). It is significant to note that, as reflected by the docket sheet, the District Court issued no order of any nature setting any sort of hearing before this order was entered, meaning once again that the Intervenors were not afforded an opportunity to produce or introduce any evidentiary material before the Court issued its order. As a result, since this order was entered on a record devoid of any evidentiary material, it is unsupported by any evidence at all.

In sum, the December 15, 1983 order imposed mandatory and prohibitory injunctive relief by imposing drastic promotional quotas, to-wit: enjoining the department and the State Personnel Department from failing to promote from December 15, 1983 forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank, this promotional quota remaining in effect as to each trooper rank above the entry-level rank until either twenty-five per cent (25%) of the rank is black or the department and the personnel department have developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the Court and all other relevant legal requirements. (It should be noted that on February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to this order and over the strenuous objection of the Intervenors.)

The United States, the department and the Intervenors appealed to the United States Court of Appeals for the Eleventh Circuit. (J.A. pp. 165-167). On August 12, 1985, the Court of Appeals affirmed the District Court's Order imposing the one-for-one quota. *Paradise v. Prescott,* 767 F. 2d 1514 (11th Cir.

1985) (See Appendix A, pp. 1a to 54a of the Petition for a Writ of Certiorari.)[1]

In erroneously concluding that the Intervenors right to equal protection was not denied by the imposition of quota relief, the Court first noted that there was a long history of discrimination in the department, but mentioned nothing concerning any discrimination regarding *promotions or promotions to corporal.* Unfortunately, the Intervenors were denied the opportunity to present evidence to demonstrate a paucity of such discrimination or to explain any alleged disparities in percentages of blacks and whites in various ranks. In any event, the Court concluded that the relief issued was appropriate to remedy the present effects of past discrimination. (See Appendix A, p. 40a of the Petition for a Writ of Certiorari.)[2]

The Court of Appeals further recognized that the District Court's Order was substantially related to the objective of eradicating the present effects of past discrimination and extended no further than necessary to accomplish the objective of remedying racial imbalances in the upper ranks of the department, agreeing with the District Court's observation that its order was a temporary measure designed only to eliminate racial imbalance. (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) It must be noted that the Court of Ap-

[1]Since the granting of the Petition for Certiorari is limited to whether the promotional quota in question is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution, only the portions of the Court of Appeals opinion dealing with this matter will be discussed.

[2]The Court had previously noted that the District Court did not commit reversible error as it related to the Title VII claims when it refused to hold an evidentiary hearing to determine whether or not the black troopers to be promoted had in fact been discriminated against. (Appendix A — p.35a of the Petition for a Writ of Certiorari.) However, the Court did not consider whether the District Court's failure to hold such an evidentiary hearing was reversible error in the context of the Intervenors Amendment claims which were raised in both their Motion to Intervene and their Complaint in Intervention. Of course, this again demonstrates the incredible difficulty the Intervenors faced when the District Court ordered a hearing on both the Motion to Intervene and the Motion to Enforce on the same day.

peals shares in the error of the District Court in considering the complained of order as a temporary measure only. In 1972, the department was directed to hire one-for-one until the department was twenty-five per cent (25%) black. Some 14 years later, this is now just being accomplished. If it takes 14 years or even a lesser period of time to accomplish a twenty-five per cent (25%) level in the rank of corporal, such a time frame can hardly be designated as temporary. The Intervenors either will be retired or close to retirement by the time this is accomplished and would have to retire without ever realizing their dream of promotion. Therefore, for the same reason, the Court of Appeals statement that white troopers will not be barred by the order for advancement through the ranks is untenable.

Finally, the Court of Appeals held that the District Court's Order did not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper and that the relief extended no further than necessary to ameliorate the present effects of the department's past discrimination. (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) However, there is no evidence at all that was introduced which would justify any finding that the imposition of quotas was necessary to somehow ease the present effects of past discrimination nor can it be stated with certainty that the District Court's Order would not require the replacement of a white trooper with a black trooper. Although because no evidence was allowed to be introduced there is no record, it certainly can be said that black troopers will be promoted over white troopers without affording any consideration to the passed over white troopers background, length of service, work record, etc. The fact that the black trooper will have to be qualified in no way soothes the innocent white trooper passed over for promotion.

SUMMARY OF ARGUMENT

The matters before this Court all emanate from the Consent Decrees entered in 1979 and 1981. These Consent Decrees

serve as "charters" establishing the principles and requirements which must be met before any promotional scheme can be legitimized by the District Court. It was a motion to enforce those decrees which lead to the matters made the basis of this proceeding and those Decrees, as well as the District Court's Order entered in response to the motion, violate the Intervenors right guaranteed by the equal protection clause of the Fourteenth Amendment. This violation is bottomed upon the undeniable premise that the Consent Decrees require promotional quotas and that the District Court Order of December 15, 1983 requires a one-for-one quota in all promotions; the latter not only being based on a silent record but without satisfying the requisite strict scrutiny.

The Intervenors were not a party to the Consent Decrees although those Decrees, because all orders entered in this case result therefrom, substantially affect and determine their right to employment and career opportunity or advancement. The absence of any input, consideration or representation from white troopers within the department who will be affected by quota promotional schemes is a factor that must be considered in evaluating whether subsequent promotional schemes entered pursuant to the Consent Decrees violate their rights guaranteed by the Constitution.

No evidence at all was presented to the District Court which demonstrated a past history of egregious, persuasive or pervasive discrimination as it related to promotion to corporal, which demonstrated that blacks to be benefited by the one-for-one promotion were actual victims of racial discrimination or which demonstrated that the remedial action chosen was warranted, was narrowly tailored to the achievement of the goal or could not be replaced with a less intrusive remedy. As a matter of fact, the Intervenors were denied the right to an evidentiary hearing in an effort to make a record. No where is this made more clear than in the opinion of the Court of Appeals where the following is quoted in f.n. 17:

> ". . . We agree with the District Court's response to intervenors' suggestion that they were unable to respond to

> plaintiffs' motion until the Court had ruled on the motion to intervene: *'haven't you had the file before you? Haven't you had an opportunity to go through it? This is not an evidentiary hearing, you know the motion was filed, and you've read it. I'll hear you on it.'* (Emphasis supplied) (See Appendix A, p. 45a of the Petition for a Writ of Certiorari.)

The initial relief ordered in this case recognized that there was to be no discrimination based on promotion on the basis of race. The resulting Consent Decrees and the order under scrutiny here violate the Intervenors' right to employment based on their race and have the effect of preventing meaningful career advancement or opportunity. It has taken the department 14 years to meet or come close to meeting the twenty-five per cent (25%) quota for black employees ordered by the District Court in 1972. Consequently, by the time it would take to meet the quotas for promotion imposed by the District Court, the Intervenors either will be retired or close to retirement without ever having the opportunity to advance to another rank. That is certainly not temporary. That certainly is not insignificant. It is, unfortunately, a severe impediment and obstacle to their career advancement and expectations. It is regrettable that the Intervenors were not allowed the opportunity to make a record on this subject for this Court's review.

ARGUMENT

I. No Evidentiary Basis Exists for the Relief Imposed

Since this Brief is submitted in support of the United States of America's Petition, the Intervenors would respectfully adopt and incorporate herein by reference, where appropriate, those portions of the United States' brief dealing with the issue of the constitutionality of promotional quotas under the circumstances of this case. This request is made both because these parties position as to this particular argument are identical in this case and because it would seem to further the important interests of judicial time and economy. Nevertheless, the Inter-

venors would, in addition to the foregoing, submit the following as argument.

In *Firefighters v. Stotts,* 467 U.S. 561 (1984), this Court recognized the significance of non-minority employees not being parties when decrees are entered thereby signifying a lack of agreement by them to any of the terms contained in those decrees. In the case of both decrees entered in this litigation, the Intervenors were not parties nor can it be imagined that they would have ever agreed to quotas in promotion. Since the order of the District Court here challenged was the result of a motion to enforce those decrees and since all orders in this case which have been entered concerning promotion since 1979 or which will ever be entered concerning promotion emanate from those decrees, the absence of the Intervenors as parties to those Decrees is a significant factor in determining whether their constitutional rights have been or are being violated. It is significant for two reasons. One is that the decrees allowed a District Court in this case to impose, without evidentiary support, a promotional quota system. Secondly, a fair reading of the decrees reveal that regardless of the fairness or job relatedness of the promotional test given, if the results adversely impact against blacks, the results cannot be used for promotion. As a result, regardless of the circumstances, or the harshness resulting to the Intervenors, they will always be subject to quotas in any promotional scheme.

The plurality in this Court's very recent decision in *Wygant v. Jackson Board of Education,* 476 U.S. ____ (1986), make it clear the obvious need and necessity for evidentiary support, particularized findings and factual determinations in ordering promotional quota relief as remedial action. As stated by Mr. Justice Powell,

> "Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by non-minority employees. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The

> ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program. But unless such determination is made, an appellate court reviewing a challenge to remedial action by non-minority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination."

Wygant v. Jackson Board of Education, 476 U.S. ..... (1986). (Opinion of POWELL, J.) It cannot be gainsaid in this case that there was a complete and total failure of any evidentiary support for the remedial action imposed by the District Court or that any factual determination was made to support the District Court's conclusion that such action was necessary. Accordingly, an appellate court cannot determine whether the race-based action imposed by the District Court was justified and by so doing the Court of Appeals erred.

As noted, the District Court denied the Intervenors the right to an evidentiary hearing and therefore it is obvious there could not be any factual determination, evidentiary support or particularized findings for the remedy imposed. Quite simply, the result was a judgment not supported by any evidence and a judgment not supported by any evidence should not be allowed. Further, the entire analysis by the Court of Appeals is flawed because it was not based upon the kind of record containing the type of findings necessary and appropriate when a challenge is made by non-minority persons to these type employment practices. (See *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986)). Hence, the Court of Appeals only compounded the error already made by the District Court.

In the Memorandum Opinion which accompanied the December 15, 1983 Order, the District Court utilized the number of blacks, regardless of age, in the State of Alabama according to the *1980 Census of Population* to support the requirement that the promotional quotas imposed should remain in effect until twenty-five per cent (25%) of each rank was black. Not only did the District Court fail to allow the introduction of any evidence concerning this matter, the Court totally ignored the possibility that the comparison tool should be limited be-

cause of the special qualifications involved in being a trooper. The importance of such an analysis and the opportunity to present evidence concerning the same is seen in *Hazelwood School District v. United States,* 433 U.S. 299 (1977), wherein this Court held, in a case claiming discrimination against blacks in hiring teachers, that the proper statistical comparison should be between the racial composition of the school district's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. In applying this rationale to this case, evidence should have been introduced and the Court should have considered the racial composition of the qualified state trooper population in the relevant labor market in making any statistical comparisons. See also *James v. Wallace,* 533 F. 2d 963 (5th Cir. 1976), wherein the Court held that the plaintiffs failed to establish a prima facie case by a statistical comparison of the percentage of the appointment of blacks to State Boards and Commissions to the percentage of blacks in the state's population inasmuch as the required qualifications might be held by a different percentage of black citizens than their numbers in the population, relying upon this Court's case of *Mayor of City of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974), which recognized that in all cases it cannot be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded.

It is clear that there must be some discrimination to justify the imposition of quotas for that promotional quotas are never proper where discrimination in promotion has not been found to exist. As recognized in *Local 28, Sheet Metal Workers' International Association v. EEOC,* 476 U.S. ..... (1986). (Opinion of BRENNAN, J.), race conscious affirmative action is appropriate only where an employer has engaged in persistent or egregious discrimination. In this case, there was absolutely no evidence upon which a finding of discrimination in promotion to corporal can be based. In ordering this relief, the District Court completely ignored the fact that the department had not promoted any persons, minority or otherwise, to

the rank of corporal except as provided by court order since 1979. The parties were never given the opportunity to demonstrate that the alleged discriminatory pattern was not the result of any discrimination. See *Hazelwood School District v. United States,* 433 U.S. 299 (1977).

II. Strict Scrutiny Is Required

It will be of little help to Paradise to argue that such a prerequisite for ordering relief of this type, i.e. strict scrutiny, was only first announced or clearly articulated in *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). As the plurality opinion reveals, many prior cases of this Court have not only admonished district courts but have directed them to make sure that the remedial action fits, that it is specifically tailored to accomplish the intended purpose. There must be a careful analysis of all surrounding circumstances before implementation of numerical relief, *Fullilove v. Klutznick,* 448 U.S. 448 (1980), that is . . . "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove v. Klutznick,* 448 U.S. 448, 491 (1980). (Opinion of BURGER, C. J.). For as stated by Mr. Justice Stevens, "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick,* 448 U.S. 448, 537 (1980) (STEVENS, J., dissenting). Therefore, one cannot say that the Court of Appeals' error can be tolerated because it occurred before this Court's decision in Wygant *supra.*

The plurality opinion in *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986), provides a succinct but yet powerful recognition of the availability and existence of equal protection claims by non-minorities based upon race. It would serve no purpose to merely rehash or recite the opinions cited by this Court but nevertheless the Intervenors rely upon the same in arguing what is obvious: that the Consent Decrees and the District Court's Order of December 15, 1983 operate against

them in favor of blacks and therefore constitute a classification based on race, a classification that must meet the type scrutiny outlined in *Wygant supra* in order not to be in violation of the equal protection clause of the Fourteenth Amendment.

In this regard, it should be noted, although probably more than obvious by now, that the Court of Appeals failed to utilize the proper standard of review in determining whether the promotional quota was constitutional. Instead of determining whether the District Court's Order passed strict scrutiny, that is whether the racial classification was justified by a compelling governmental interest and whether the means chosen to effectuate this interest were narrowly tailored, the Court of Appeals opted for a hybrid formulation gleaned from a trilogy of cases noted in their opinion. (See Appendix A, pp. 36a-39a of the Petition for a Writ of Certiorari.) See also *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.)

The Court of Appeals erred in affirming the District Court's race conscious relief because it was not justified by a compelling governmental interest in that the type evidentiary record required concerning past discrimination in promotions was not made, there was simply no evidentiary support to justify the remedial action or to determine it was necessary. However, the Court of Appeals also erred in affirming the District Court because the remedy was not narrowly tailored to the achievement of the interest to be served, that being the second prong of the strict scrutiny test announced in *Wygant supra,* that formulation being nothing more than a reaffirmation of the existing standards. Using *Wygant supra* as a model, it is not difficult to see why the race conscious relief ordered here was not narrowly tailored.

These innocent Intervenors are being required to share too much of the burden, especially when they have done nothing to prevent blacks from advancing and where blacks who have not been identified as actual victims of discrimination will advance over them. Here, the Intervenors are not faced with the

denial of a future employment opportunity, which can be speculative. Rather, the Intervenors are faced with unfulfilled hopes of promotion based and earned from many previous years of dedicated service. It is only natural for them to expect that many years of service will result in the ultimate reward: promotion. Perhaps the most common fabric in our society is that those who work hard and perform their jobs competently will be rewarded through promotion. The effect of the District Court's Order deprives the Intervenors of this valued expectation and career opportunity. Or as stated by Mr. Justice Powell in *Wygant supra,* . . . "A worker may invest many productive years in one job in one city with the expectation of earning the stability and security of seniority. . . .", *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.) Here, the Intervenors have already invested many productive years in one job with the obvious expectation of earning stability and financial security, not to mention the self-esteem and respect connected with promotion. With promotion comes benefits, not only monetary ones but psychological and emotional ones as well. The District Court's Order deprives the Intervenors of their dreams and expectations.

It is not enough to say that this will only be temporary or in the words of the Court of Appeals . . . "white troopers are not barred by it from advancement through the ranks." . . . . (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) There is no way of knowing when this promotional quota will be reached. If evidence could have been presented, it would have shown that the Intervenors in all likelihood might either be retired, near retirement or eligible for retirement by the time this goal will be accomplished. If it took 14 years for the department as a whole to reach the hiring quota, then it is not unreasonable to assume that a similar length of time will be needed to achieve the goals imposed by the District Court.

As a result, the burden on the Intervenors is too intrusive in that it imposes upon them the entire burden of achieving racial equality. *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.) It deprives them

of the only opportunity to which they have to look forward: promotion.

There is a less intrusive remedy in this case. Any preferential treatment accorded to nondiscriminatees — or to discriminatees beyond those measures necessary to make them whole — necessarily deprives innocent incumbent employees of their rightful places. Accordingly, as between non-victims of unlawful discrimination and innocent third parties, it cannot be said that the government has a greater interest in helping one individual than refraining from harming another. *Regents of the University of California v. Bakke,* 438 U.S. 265, 308-309 (1978). (Opinion of POWELL, J.) Accordingly, the only remedy that should be imposed would be one that restores proven discriminatees to the position they would have occupied in the absence of discrimination. In this case, innocent whites and nondiscriminated-against blacks should be treated equally in the promotion process. To do otherwise would mean that the relief or remedy is not narrowly tailored to the achievement of the requisite purpose.

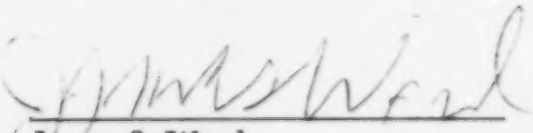
CONCLUSION

The Eleventh Circuit erred in allowing the District Court's race conscious relief to stand. It erred in affirming the District Court in the absence of affording the Intervenors an opportunity for an evidentiary hearing, and in the absence of an appropriate and necessary record containing evidentiary support and particularized findings to justify the relief in question under the appropriate standard of strict scrutiny. To allow the Eleventh Circuit's opinion to stand would mean that District Courts, when faced with constitutional challenges to race conscious remedies by non-minorities, could impose relief almost without limitation or constitutionally sanctioned boundaries. It is not the District Court's function to favor one race over another. It is not the District Court's function to make judgments without the requisite evidentiary support. It is the District Court's function to analyze race conscious relief with strict

scrutiny, and to insure that that test has been met. It was the function of the Eleventh Circuit in this case to insure that the District Court, in imposing the complained of race conscious remedy, applied the appropriate standards and analysis. The Eleventh Circuit failed in its function in that it not only allowed the District Court to escape without utilizing the appropriate scrutiny but it compounded the error by succumbing to the same failure.

As a result of the Court of Appeals affirmance, these innocent Intervenors will have placed before them serious, if not permanent, obstacles and barriers to the one goal to which they can look forward: promotion. On the state of this record, the opportunity for career advancement and promotion should not be taken away from them. The Eleventh Circuit has done so and therefore their decision must be reversed.

Respectfully submitted,



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QUESTION PRESENTED

Whether the district court's race-conscious order enforcing two consent decrees against recalcitrant state agencies previously found to have blatantly violated the rights of blacks abridges the Equal Protection Guarantee.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: Phillip Paradise, Jr., and the class he represents; the United States of America; the Alabama Department of Public Safety and its director, Byron Prescott; and intervenors V.E. McClellan, William M. Bailey, D.B. Mansell, and Dan Davenport, white troopers, and the class they represent.*

*Although originally a plaintiff, the NAACP voluntarily withdrew as a party during the course of the litigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-999

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILLIP PARADISE, JR., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The 1985 opinion of the court of appeals (Pet. App. 1a-54a) is reported at 767 F.2d 1514. The 1983 order and memorandum opinion of the district court (Pet. App. 55a-64a; J.A. 128-137) are reported at 585 F. Supp. 72. Earlier decisions below, which bear directly upon the issue before this Court, are: *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (J.A. 23-29), *supplemented sub. nom. United States* v. *Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974), *aff'd sub nom. NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Paradise* v. *Dothard*, No. 3561-N (M.D. Ala. Aug. 5, 1975) (J.A. 30-36); *Paradise*

v. *Shoemaker*, 470 F. Supp. 439 (M.D. Ala. 1979); and *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983).

STATEMENT

This case presents the narrow question whether the district court's order directing the Alabama Department of Public Safety (the "Department") and the Alabama Personnel Department to promote one qualified black trooper for each white trooper promoted until the Department adopts acceptable promotion procedures or until 25 percent of the officers at a given rank are blacks violates the Constitution's Equal Protection Guarantee. Adopted to remedy the continuing effects of notorious racial discrimination and to enforce two consent decrees designed to insure that blacks would attain supervisory positions within the Department, the district court order was a necessary remedy narrowly tailored to further these compelling purposes without unnecessarily infringing on the employment opportunities of white troopers.

The case now before this Court is but the latest chapter in continuing efforts to desegregate the Alabama state troopers. Proceedings were initiated in January 1972 when the NAACP brought this action against the Department and the Alabama Personnel Department alleging that the defendants systematically excluded blacks from employment in violation of the Fourteenth Amendment. J.A. 23-24. The United States was joined as a party plaintiff (and *amicus curiae*), and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs ("Paradise"). Pet. App. 3a.

After a hearing, Judge Frank Johnson found:

> Plaintiffs have shown without contradiction that the *defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring* in the Alabama Department of Public Safety, both as to troopers and supporting personnel. *In the thirty-seven-year history*

> *of the patrol there has never been a black trooper* and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.

NAACP v. *Allen*, 340 F. Supp. at 705; J.A. 25 (emphasis added).

NAACP v. *Allen* was not the first time that the employment practices of Alabama state agencies had been condemned by the federal court. In *United States* v. *Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), Judge Johnson had found that various state agencies, including the Alabama Personnel Department,[1] were systematically violating the constitutional rights of black applicants and employees. *Id.* at 1089-90.[2] In his decision, Judge Johnson noted that extended and repeated efforts to persuade Alabama even to acknowledge constitutional guarantees had failed:

> From 1963 until the commencement of this lawsuit in June, 1968, federal officials made repeated but unsuccessful efforts to persuade defendant officials and their predecessors to adopt a regulation expressly prohibiting discrimination on the ground of race or color . . . . Defendants have repeatedly refused to adopt such a regulation. *Alabama is the only state among the fifty*

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[1] "Since the Department of Personnel was one of the defendants in *Frazer* and Personnel supplies employees to all state agencies, the provisions of the *Frazer* order were applied across the board to all Alabama agencies." *United States* v. *Dothard*, 373 F. Supp. at 506.

[2] The discrimination was not subtle. It included the "practice of segregating employees by race in the use of facilities such as rest rooms, snack bars, and cafeterias." 317 F. Supp. at 1090.

states which has refused to adopt such a regulation.

Id. at 1084-85 (footnote omitted) (emphasis in original).

In light of *Frazer*, Judge Johnson found that the defendants in *NAACP* v. *Allen* "unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment to the United States Constitution." 340 F. Supp. at 708.[3] Accordingly, he enjoined them from engaging in discriminatory "employment practices, including . . . promotion," and ordered them to "hire and permanently employ . . . one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." J.A. 27.

Defendants appealed. While that appeal was pending, the court of appeals ordered the district court to supplement the record and to reconsider its decree in the light of current information. *See United States* v. *Dothard*, 373 F. Supp. at 505. Following discovery and the submission of additional data,[4] Judge Johnson decided to leave his original decree unaltered. *Id.* at 508. Comparing the relative efficacy of the injunction prohibiting discrimination in *Frazer* and the numerical relief ordered in *Allen*, Judge Johnson concluded:

> The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants — that is, those who have been processed through the

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[3] Because the defendants' actions were so defiant, Judge Johnson found that their defense in *NAACP* v. *Allen* amounted to "unreasonable and obdurate conduct" meriting an award of attorneys' fees against them. 340 F. Supp. at 708.

[4] The district court specifically added to the record in this case the evidence that had been received in *Frazer*. 373 F. Supp. at 508.

> Department of Personnel — *Allen* has seen substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent . . . .
>
> [T]his Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved.

Id. at 506-507 (footnotes omitted).

On appeal, defendants did not challenge the district court's finding of blatant discrimination. *NAACP* v. *Allen*, 493 F.2d at 617. Instead, they attacked only the affirmative relief granted, contending that the one-for-one hiring order unconstitutionally discriminated against white applicants. *Id.* at 617-618.[5] Observing that the "supplemental record here" comparing the progress under *Allen* with that under *Frazer* "provides an unusual confirmation of the feasibility, wisdom and efficacy of the [*Allen*] decree," *Id.* at 621, the court of appeals rejected defendants' contention and affirmed the judgment below. *Id.* at 622. The court noted that the remedial hiring order:

> is not without its limitations. The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past

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[5] In substance, defendants raised in *Allen* the same constitutional argument with respect to hiring that Petitioner here raises with respect to promotion. In *Allen*, the United States supported the one-for-one hiring order.

> practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit.

Id.

Shortly after the court of appeals' 1974 decision, the plaintiffs were forced to seek supplemental relief. Following a hearing, the district court found in 1975 that "defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." J.A. 34. Even the few blacks hired under the court's 1972 order had faced discriminatory conditions.

> [T]he high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force.

Id.

In September 1977, plaintiffs were required once again to move the district court for supplemental relief. J.A. 5. "Faced with [a] poor track record, as well as additional allegations of discrimination"[6] — including discrimination in making promotions to the position of corporal[7] — the defendants,

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[6] Pet. App. 40a.

[7] *See* Plaintiffs' Motion for a Preliminary Injunction ¶ 7(e), *Paradise* v. *Hilyer*, No. 3561-N (M.D. Ala. June 15, 1978) ("Not one black trooper has been promoted past the trooper rank, whereas six of the white

after extensive discovery, entered into a Partial Consent Decree ("1979 Decree") with plaintiffs and the United States. *See* J.A. 37. At the time, the Department had not promoted a single black trooper above the entry-level. *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

Under the 1979 Decree, the parties recognized the continuing force of the district court's 1972 and 1975 orders. J.A. 37. To help create a "racially neutral" employment and promotion system, J.A. 37, defendants agreed to implement a new disciplinary review procedure, J.A. 38-39, a race relations program, J.A. 39-40, and a promotion procedure that would have "little or no adverse impact upon blacks seeking promotion to corporal." J.A. 40.[8] The Department promised to develop such a promotion procedure and submit it for the plaintiffs' review and the court's approval "no later than one year from the signing of th[e] Consent Decree," i.e., by February 16, 1980. J.A. 40, 45.[9] Once a new procedure for promotion to corporal was in place, the Department agreed that it would develop promotion procedures having little or no adverse impact upon blacks for "the position of sergeant, and, in turn, for the positions of lieutenant, captain, and major." J.A. 41.

Five days after the district court approved the 1979 Decree, defendants sought "clarification" of the 1972 order, asking "whether the twenty-five percent hiring quota applies to the entire state trooper force or just to entry-level troopers."

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troopers who were hired since 1972 have been promoted to the rank of corporal.").

[8] The Department also agreed that the promotion procedures would conform to the Uniform Guidelines on Employee Selection Procedures. J.A. 40; *see* 29 C.F.R. § 1607 (1985).

[9] In the interim, the Department agreed to use a promotion procedure pursuant to which four black troopers were promoted to corporal. J.A. 41, 46-48; Pet. App. 42a n.16.

Paradise v. *Shoemaker*, 470 F. Supp. at 440. "On this point," the court responded, "there is no ambiguity. The Court's order required that one-for-one hiring be carried out until approximately twenty-five percent of the *state trooper force* is black. It is perfectly clear that the order did not distinguish among troopers by rank." *Id.* (emphasis in original).

In rejecting defendants' argument that the hiring order went further than necessary to eradicate the effects of past discrimination, the court declared:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. . . . The order in this case is but the necessary remedy for an intolerable wrong.

Id. at 442 (emphasis in original).

In April 1981, more than a year after the deadline to which it had agreed in the 1979 Decree, the Department proposed a selection procedure for promotion to corporal and requested its approval by the district court. Both the United States and Paradise objected. In a joint response, they observed that the examination had not been validated and that its use would not be justified if the results had an "adverse impact" on black applicants. Pet. App. 12a; *see* J.A. 50. But, to put an

acceptable promotion procedure in place expeditiously, the parties entered into a second consent decree in August 1981 ("1981 Decree"). J.A. 49-54.

Under the 1981 Decree, defendants reaffirmed their obligation under the 1979 Decree "to utilize a selection procedure which has little or no adverse impact on blacks seeking promotion to corporal." J.A. 50. The parties agreed that the Department's proposed promotion procedure would be administered and the results "reviewed to determine whether the selection procedure has an adverse impact against black applicants." J.A. 51. Under the scoring system, four factors were weighted in the following manner: written test, 60 percent; length of service, 10 percent; supervisory evaluation, 20 percent; and service ratings, 10 percent. J.A. 56. Given the method of rating length of service, differences in seniority could account for no more than a three percent difference in the final scores of candidates for promotion.[10]

If the proposed promotion procedure had little or no adverse impact upon blacks, selections were to be made in rank order. If the parties agreed, or the court found, that the procedure had an adverse impact upon blacks, promotions were to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively." J.A. 52. To accomplish this goal, defendants were required to submit an alternative proposed promotion procedure and, if the parties failed to agree on the method for making promotions, the matter was to be "submitted to the Court for resolution." J.A. 52-53.

In October 1981, 262 applicants took the written corporal's examination. Pet. App. 14a; J.A. 119. Of the 60 blacks, only

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[10] The minimum length of service rating was 70 points; the maximum, 100 points. J.A. 51. Applying the 10 percent weight for length of service used in arriving at a candidate's final score, the minimum number of points for seniority in the final score was 7; the maximum, 10.

five were ranked among the top half of the applicants; the highest was ranked number 80. Pet. App. 14a; J.A. 119. In June 1982, in response to an inquiry from the United States, the Department stated that "there was an immediate need for 8-10 promotions to corporal, and that 16-20 promotions would ultimately be made from the promotion list before the construction of a new list." Pet. App. 14a. The United States "objected to rank-order use of the promotion procedure, contending that . . . such use would result in substantial adverse impact on black applicants for promotion to corporal," Pet. App. 14a-15a, and advised the Department to "abide by the terms of the 1981 Decree and formulate a 'proposal for making promotions in a manner that does not result in discriminatory impact on black troopers.'" Pet. App. 15a (citation omitted). The Department did not do so. Brief for the United States at 8.

In April 1983, Paradise moved the district court for an order enforcing the terms of the two consent decrees. Pet. App. 15a; J.A. 58. Paradise sought an order requiring the defendants to promote blacks to corporal "at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotion procedure." J.A. 62. According to Paradise, such an order was justified by the terms of the decrees, would "encourage defendants to develop a valid promotional procedure as soon as possible," and would "help alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department." J.A. 62.

Although it opposed a one-for-one promotion requirement, the United States agreed that the consent decrees should be enforced. Pet. App. 15a-16a. Noting that "defendants [had] failed to offer any reasons why promotions should not be made, nor had they offered an explanation as to why they halted progress towards remedying the effects of past discrimination," Pet. App. 16a n.10, the United States contended that the Department's failure to come up with a promotion plan in conformity with the 1979 and 1981 Decrees

"'suggests that a pattern of discrimination against blacks in the Department . . . may be continuing.'" *Id.* (citation omitted).

Defendants opposed the motion to enforce. In addition, four white applicants for promotion to corporal "moved to intervene on behalf of a class composed of those white applicants who took the corporal's promotion examination and ranked #1 through #79." Pet App. 16a; *see* J.A. 81-87. Claiming that the 1981 promotion procedure had been administered "in a racially neutral and non-discriminatory manner", J.A. 107, intervenors maintained that the no adverse impact provisions of the 1979 and 1981 Decrees, as well as the relief sought by Paradise, were "unreasonable, illegal, unconstitutional or against public policy." J.A. 99.

On May 27, 1983, the district court held a hearing on the motion to enforce and the motion to intervene. Pet. App. 17a. In an order entered October 28, 1983, the district court determined that the defendants' selection procedure had an adverse impact on black applicants. *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983) (J.A. 117-124).[11] Noting that the Department "need[ed] additional corporals and . . . need[ed] at least 15 of them as soon as possible," J.A. 119, the court concluded:

> Applying the four-fifths rule [of the Uniform Guidelines] and assuming fifteen candidates are to be promoted in rank order based on the selection procedure results, the success rate for white persons would be 15/202 or 7.4%, and the success rate for black persons would be 0/60 or 0%. Zero is, of course, less than four-fifths of 7.4. Indeed, even if seventy-nine corporals were promoted in

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[11] In a separate order filed the same day, the district court allowed the intervenors to participate in the case on a prospective basis only; the court held that as to prior orders, judgments, and decrees, intervention was untimely. J.A. 116. The intervenors did not appeal the court's order limiting intervention. Pet. App. 49a.

> rank order, none would be black. *Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact.*

J.A. 120-121 (emphasis added).[12] In light of this conclusion, the court ordered the Department to submit, by November 10, 1983, "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact." J.A. 123.

On November 10, 1983, the Department submitted to the district court a proposal to promote 15 troopers to the rank of corporal, of whom four would be black, "utilizing the 'rule of three' as provided in the Alabama Merit System Law." J.A. 126.[13] In the Department's words, its plan would apply "on a one time basis only." J.A. 125. As in the past, the Department promised to produce a "nondiscriminatory" promotion procedure "as soon as possible." J.A. 126. The United States did not oppose the Department's proposal. Pet. App. 19a.

Paradise objected. Pointing out that the Department's proposal ignored the injury black troopers had suffered from the defendants' inexcusable delays and "'fail[ed] to provide

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[12] "Accepting the defendants' anticipated evidence as true," the district court also rejected the defendants' contention that the one-for-one hiring order was a special program within the meaning of section 4D of the Uniform Guidelines, 29 C.F.R. §1607.4.D, that would insulate the defendants from a finding of adverse impact. J.A. 121.

[13] Under the "rule of three", the Department was not required to select any particular individual for promotion. Instead, the Director of the Personnel Department certified for the Department's consideration "the name of the three ranking eligibles . . . and, if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy." Ala. Code § 36-26-17 (1975), *amended by* Ala. Code § 36-26-17 (1985). In 1985, the "rule of three" was replaced by the "rule of ten." Ala. Code § 36-26-17 (1985).

any mechanism that will insure the present scenario will not reoccur,'" Pet. App. 18a (citation omitted), Paradise argued that approval of the Department's one-time plan would, in effect, sanction the defendants' recalcitrance. Pet. App. 19a.

On December 15, 1983, the district court granted Paradise's motion to enforce the 1979 and 1981 Decrees. *Paradise* v. *Prescott*, 585 F. Supp. 72 (M.D. Ala. 1983) (J.A. 128-137). In reaching its decision, the court reviewed not only the Department's 37-year, pre-1972 history of blatant discrimination against blacks, but also its post-1972 history of recalcitrance. J.A. 130-131. The court found:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue.

J.A. 132-133 (emphasis in original).

To address this longstanding, intolerable condition and the "department's delay in developing acceptable promotion procedures for all ranks," the district court entered an order

"requiring that, for each white trooper promoted to a higher rank, the department shall promote one black trooper to the same rank, *if there is a black trooper objectively qualified for the promotion.*" J.A. 133 (emphasis added). The order remains "in effect as to each rank above entry level until either 25% of the rank is black or the department has developed and implemented for the rank a promotion procedure which meets the requirements of the prior orders and decrees of th[e] court and all other legal requirements." J.A. 133-134.

As experience in this case demonstrated, lesser measures would not suffice. According to the district court, "[t]he racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration, and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future." J.A. 135. "This court has before it a record demonstrating that without promotional quotas the continuing effects of this discrimination cannot be eliminated." J.A. 136.

After determining that the one-for-one promotion requirement was necessary, the district court concluded that it was "specifically tailored to redress the continuing effects of past discrimination" and did "'not unnecessarily trammel the interest of white employees.'" J.A. 135 (footnote omitted), *quoting United Steelworkers* v. *Weber*, 443 U.S. 193, 208-09 (1979). According to the district court, the order does:

> not require the discharge or demotion of a white trooper or his replacement with a black trooper; nor [does it] create an absolute bar to the advancement of white troopers. Moreover, [it is] but a temporary measure, designed not to maintain a racial balance, but simply to eliminate a manifest and chronic racial imbalance. Finally,

> only qualified black troopers will be considered for promotion....

J.A. 135.[14]

In February 1984, the Department promoted eight blacks and eight whites to corporal pursuant to the district court's one-for-one requirement. Pet. App. 22a. On June 19, 1984, the Department submitted for the court's approval a proposed procedure for promotion to corporal, representing in an accompanying statement that the procedure "conforms with the applicable statutes and Orders entered in this case." J.A. 142; *see* Pet. App. 45a-48a, J.A. 144-145. The United States expressed the view that the proposed procedure did not appear to have "an unlawful adverse impact" upon black applicants and hence was acceptable under the consent decrees. J.A. 161. On July 27, 1984, the district court ruled that the Department could promote up to 13 troopers to corporal in accordance with its new procedure and temporarily suspended the one-for-one promotion mechanism for that purpose. J.A. 163-164. On October 25, 1984, the district court, following the defendants' submission of a new selection procedure for promotion to sergeant, similarly suspended the one-for-one requirement at the sergeant rank. J.A. 176-177. Since that time, "the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks." Pet. App. 54a.

The court of appeals consolidated the various appeals from

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[14] In its Statement, Petitioner asserts that the district court found the promotion order to be "reasonable" under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Brief for the United States at 11. What Petitioner fails to say is that the court also found the promotion order to be "clearly necessary" and "sepcifically tailored to redress the continuing effects of past discrimination." J.A. 135.

the district court's December 15, 1983 order[15] and the intervenors' appeal from the July 27, 1984 order and, in a thorough opinion, affirmed the district court's decision. Pet. App. 1a-54a. First, it rejected the appellants' contention that the district court's order improperly modified, rather than simply enforced, the 1979 and 1981 Decrees. Pet. App. 23a. Construing the consent decrees to prohibit "adverse impact" against blacks, but not whites, Pet. App. 26a, the court held that the lower court "did not . . . exceed the relief authorized by those decrees when it granted plaintiffs' motion to enforce." Pet. App. 27a. This Court declined review of this ruling. 106 S.Ct. 3331 (1986).

Second, the court of appeals held that the order adopting the one-for-one promotion requirement did not violate Title VII. Pet. App. 28a-35a. In so ruling, the court distinguished *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), and concluded that the district court's order "will not be reversed simply because black troopers promoted under it have not been identified as specific victims of unlawful discrimination." Pet. App. 34a-35a. This Court declined review of this ruling as well. 106 S.Ct. 3331.

Third, the court of appeals held that the district court's order did not deprive white troopers of their constitutional rights to equal protection. Pet. App. 35a-42a. After reviewing past precedent, the court expressed the view that "the differences between the various" equal protection tests "are more of phraseology than of substance". Pet. App. 39a. The court concluded that "the relief now at issue was designed to remedy the present effects of past discrimination," Pet. App. 40a — "effects which, as the history of this case amply demonstrates, 'will not wither away of their own accord,'" Pet. App. 41a (citation omitted) — and "extends no further

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[15] The United States, the Department, and the intervenors had appealed. Pet. App. 22a.

than necessary to accomplish the objective of remedying the 'egregious' and longstanding racial imbalances in the upper ranks of the Department." Pet. App. 41a (citation omitted). As a result, the court declared that it was not prepared "to upset the considered judgment of the district court that 'without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated.'" Pet. App. 42a (citation omitted) (bracketed material by the court).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with a race-conscious remedial order designed to open the upper ranks of the Alabama state troopers to qualified blacks. Although the Government claims that Alabama's Department of Public Safety "had already made substantial progress" by the time the order was entered, Brief for the United States at 37, the reality is that this case demonstrates why the Court has "recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." *Wygant* v. *Jackson Board of Education*, 106 S.Ct. 1842, 1850 (1986) (opinion of Powell, J.).

In deciding this case, the Court need not resolve questions concerning the proper formulation of the equal protection test.[16] Even assuming that "strict scrutiny" is applicable, the

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[16] Although the Government states that "[t]he proper standard by which to evaluate the constitutionality of race-conscious governmental action under the Equal Protection Clause is now clear," Brief for the United States at 17, this Court has expressed the opposite view. *See Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 106 S.Ct. 3019, 3052 (1986) (opinion of Brennan, J.) ("[w]e have not agreed ... on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures"); *Wygant*, 106 S.Ct. at 1852 (O'Connor, J., concurring) ("standard applicable to racial classifications that work to the

district court's order easily withstands it. By enforcing the consent decrees, the order furthered a compelling governmental interest — eradicating the pervasive effects of the Department's egregious discrimination. Contrary to the suggestion of the other parties, the order was not entered merely because the Department failed to achieve "racial balance." Rather, it was entered as a result of the Department's refusal to abide by its judicially-entered consent decree commitments — commitments that required the Department to allow qualified black troopers to advance.

Like the one-for-one hiring requirement imposed in 1972, the conditional one-for-one promotion requirement at issue here was "but the necessary remedy for an intolerable wrong." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. The "record here provides an unusual confirmation of the feasibility, wisdom and efficacy of the" promotion order. *NAACP* v. *Allen*, 493 F.2d at 621. After twelve years of tenaciously refusing to advance blacks past the entry-level, the Department finally has moved to adopt promotion procedures by which black troopers can progress as a result of the court's command.

The district court's order is carefully crafted. It accommodates legitimate reasons for the Department's failure to promote blacks because it requires neither unnecessary promotions nor the promotion of the unqualified. The applicability of the one-for-one promotion requirement is extremely limited. It operates only if the Department fails to fulfill its consent decree commitment to develop acceptable promotion procedures and, then, only if the Department has not achieved the goal of 25 percent black representation at a given rank — a goal clearly related to availability. Courts often

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disadvantage of 'nonminorities' has been articulated in various ways"); *Wygant*, 106 S.Ct. at 1867 n. 7 (Marshall, J., dissenting) ("I do not envy the District Court its task of sorting out what this Court has and has not held today.").

have imposed far more stringent race-conscious measures.

The district court's order has only a limited impact on white troopers. It does not require the demotion or discharge of any white troopers, does not bar white troopers from advancing, and does not disrupt any legitimate expectations for promotion white troopers may have on the basis of valid selection procedures. Like a hiring goal, the one-for-one promotion requirement here results in, at most, a "[d]enial of a future employment opportunity." *Wygant*, 106 S.Ct. at 1851 (opinion at Powell, J.). And unlike preferential layoff schemes, the one-for-one promotion requirement has literally no impact on any legitimate expectations based on seniority. In this case, failing to achieve a promotion is far more akin to not being hired than it is to losing an existing job.

ARGUMENT

THE DISTRICT COURT'S ENFORCEMENT ORDER DOES NOT VIOLATE THE CONSTITUTION'S EQUAL PROTECTION GUARANTEE BECAUSE IT IS NARROWLY TAILORED TO REMEDY THE PERVASIVE EFFECTS OF THE DEPARTMENT'S EGREGIOUS DISCRIMINATION

A. *Remedying the Pervasive Effects of the Department's Egregious Discrimination by Enforcing Its Consent Decree Commitments Is a Compelling Governmental Interest*

As the Government acknowledges, "[g]iven the pervasive past discrimination practiced by the Department, . . . the first prong of this Court's 'strict scrutiny' test [the compelling governmental interest requirement] is met here." Brief for the United States at 21-22; *see, e.g.*, *Wygant*, 106 S.Ct. at 1850-51 (opinion of Powell, J.); *id.* at 1853 (opinion of O'Connor, J.); *Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of

Brennan, J.). Indeed, the district court's "order is supported not only by the governmental interest in eradicating [the Department's] discriminatory practices, it also is supported by the societal interest in compliance with the judgments of federal courts." *Sheet Metal Workers'*, 106 S.Ct. at 3055 (opinion of Powell, J.). The Department's and the intervenors' claim that no compelling governmental interest exists here — a claim premised on the contention that the district court found the Department guilty "only" of hiring discrimination[17] — ignores both the character of the Department's transgressions and the fact that the district court's order simply enforced the consent decrees the Department had signed.

"In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. Rather the district court found that "the [D]epartment operated under a *regime of racism* which totally excluded blacks from all ranks in the patrol." J.A. 140 (emphasis added); *see Paradise* v. *Shoemaker*, 470 F. Supp. at 442; *NAACP* v. *Allen*, 340 F. Supp. at 705 (J.A. 26) (emphasis added) ("racial discrimination in this instance has . . . *permeated* the Department of Public Safety's employment policies").[18]

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[17] Brief for the Department at 8 n.3, 24-25, 27; Brief for the Intervenors at 8.

[18] In addition to "operat[ing] under a regime of racism," J.A. 140, the Department enforced a "regime of racism" throughout the State. *See Williams* v. *Wallace*, 240 F. Supp. 100, 105 (M.D. Ala. 1965) (blacks walking from Selma to Montgomery to protest discriminatory voting registration practices brutally attacked by 60 to 70 Alabama state troopers under the command of the Director of Public Safety). Fostering a more responsive trooper force was a principal rationale underlying the court of appeals' affirmance of the district court's 1972 injunctive decree.

> "Finally, but perhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a

Given the enormity of the Department's constitutional wrong,

> it is no answer in this case to say that plaintiffs have not proven that the Department has discriminated against blacks above the entry-level seeking promotions; there were no blacks holding such positions until 1979, and even then the only black troopers promoted obtained their promotions pursuant to the 1979 Decree, not the voluntary action of the Department. On the other hand, it cannot be gainsaid that white troopers promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks.

Pet. App. 42a n.16.

The district court's 1972 order was designed not only to remedy the Department's "blatant and continuous pattern of discrimination in hiring," *NAACP* v. *Allen*, 340 F. Supp. at 705; J.A. 25, but also to provide the Department with "an impetus to promote blacks." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.[19] Having promoted none in the seven years

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police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement."

NAACP v. *Allen*, 493 F.2d 621 (citation omitted); *cf.* United States Commission on Civil Rights, Who is Guarding the Guardians?: A Report on Police Practices 153 (1981) [hereinafter, "Police Practices"] (underutilization of minorities hampers "the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence"); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 167 (1967) [hereinafter, "The Police"] ("to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole").

[19] As Judge Johnson explained in ruling that the 25 percent goal set in 1972 applied to the trooper force as a whole, "To focus only on the entry-

following the district court's order, *see id.*, and facing wide-ranging charges of continued discrimination, including allegations that the Department had discriminated against blacks since 1972 in making promotions to corporal,[20] the Department entered into the 1979 Decree. *See* J.A. 37-45.

Recognizing the long-term "objective" of a "racially neutral" employment system, J.A. 37, the 1979 Decree called for new disciplinary review procedures, a race relations program, and the implementation of promotion procedures with "little or no adverse impact on blacks." J.A. 39-41. Under the terms of the Decree, compliance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, did not excuse the Department from developing promotion procedures which would have "little or no adverse impact on blacks." J.A. 40. In other words, the Decree mandated race-conscious promotion procedures. *Id.*[21] The

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level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

[20] *See, e.g.*, Plaintiffs' Motion for a Preliminary Injunction ¶7(e), *Paradise* v. *Hilyer*, No. 3561-N (M.D. Ala. June 15, 1978) ("Not one black trooper has been promoted past the trooper rank, whereas six of the white troopers who were hired since 1972 have been promoted to the rank of corporal.").

[21] For this reason, the Government contended in the court of appeals that the "no adverse impact" provisions of the 1979 and 1981 Decrees:

> cannot be squared with the victim-specific limits on affirmative equitable relief under Title VII, as enunciated by the Supreme Court in [*Firefighters Local Union No. 1784* v.] *Stotts* [, 467 U.S. 561 (1984)]. These provisions appear to go beyond enjoining promotions until valid selection procedures can be implemented, requiring instead that promotions be made in accord with certain racial ratios — quotas — to ensure racially proportional promotions. To the extent that they do, the "no adverse impact" provisions are unlawful under *Stotts*.

procedures for promotion to corporal were to be developed no later than "one year from the signing of th[e] Consent Decree." *Id.* Procedures for promotion to other ranks were to follow in turn. *Id.* at 41.[22]

Almost five years later, the district court found that despite the Department's consent decree commitments

> the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future.

J.A. 133 (emphasis in original). Confronted with the

Brief for the United States as Appellee at 19-20, *Paradise* v. *Prescott*, 767 F.2d 1514 (11th Cir. 1985) (No. 84-7564). The Government pointed out, however, that the validity of the consent decrees and their "no adverse impact" provisions was not properly before the court, *id.*, an assessment with which the court agreed. Pet. App. 49a n.18.

[22] There was nothing inconsistent with including a race-conscious promotion provision in a decree having a "racially neutral" employment system as its objective. Such a provision dismantles "the barriers, psychological or otherwise, erected by past practices" and helps to create "a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit." *NAACP* v. *Allen*, 493 F.2d. at 621; *see Sheet Metal Workers'*, 106 S.Ct. at 3037 (opinion of Brennan, J.); *cf.* Police Practices, *supra* note 18, at 153 (disproportionately white police command structures hamper minority recruitment efforts and fuel "community perception of racism"); The Police, *supra* note 18, at 172 (crucial role of high-ranking minority police officers in fostering sensitivity within police departments and dispelling community resentment); Fallon & Weiler, *Firefighters* v. *Stotts: Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 36-37 ("fuller representation of blacks in positions of responsibility provides some assurance against a reversion to reliance on stereotypes").

Department's recalcitrance, the district court entered an order enforcing the 1979 and 1981 Decrees.[23] Designed to "eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future," J.A. 134, the enforcement order served a compelling governmental purpose. *See, e.g., Wygant*, 106 S.Ct. at 1850-51 (opinion of Powell, J.); *id.* at 1853 (opinion of O'Connor, J.); *Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan,J.).

"[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). The absurdity of the position asserted by the Department and the intervenors is obvious. Saddled with judicial findings of "blatant and continuous" discrimination that had "permeated [its] employment policies," *NAACP* v. *Allen*, 340 F. Supp. at 705; J.A. 25-26, employing "*still not one black*" above the entry-level, *Paradise* v. *Shoemaker*, 470 F. Supp. at 442 (emphasis in original), and facing new allegations of promotion discrimination, the Department chose to settle rather than litigate, entering into a consent decree mandating promotions with "little or no adverse impact upon blacks." J.A. 40; *see* J.A. 49-53. Told that it finally must live up to its obligations, the Department now resists enforcement

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[23] The court of appeals held that the district court's enforcement order "did not modify the 1979 and 1981 Decrees or exceed the relief authorized by those decrees." Pet. App. 27a. Although that holding is not before this Court, *see* 106 S.Ct. 3331, the Department makes a number of statements or arguments premised on the assumption that the court of appeals erred. *See* Brief for the Department at 6 (district court "did not enter an order requiring use of promotional plan '. . . that does not result in adverse impact for the initial group . . .' as required by the consent decree"); *id.* at 9 n.5; *id.* at 14 (emphasis in original) (district court "utilized race as the means of *enforcement* of consent decrees having racially neutral purposes"); *id.* at 35 ("instead of adhering to parties' purpose, district court interjected race as the means to 'enforce' the consent decrees").

by claiming that there was, after all, no judicial finding of promotion discrimination.[24]

Given that the district court's order enforced the Department's consent decree commitments, the contention by the other parties that the order is supported by nothing more than the fanciful notion that the constitution requires some sort of magical "racial balance" is misguided. *See* Brief for the United States at 22; Brief for the Department at 23-24; Brief for the Intervenors at 8.[25] The one-for-one promotion mechanism "was not imposed for the [Department's] failure to achieve" racial balance, "but for its failure to take the prescribed steps that would facilitate achieving the goal." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.). The district court considered the gross and longstanding racial

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[24] The corollary to the claim that there is no judicial finding of promotion discrimination is the Department's and intervenors' contention that the district court was required to hold an evidentiary hearing to resolve the question. *See* Brief for the Department at 25, 31; Brief for the Intervenors at 6-7, 12-13. But, again, because the court was enforcing previously entered consent decrees, such a determination was unnecessary. The Department's claim that it was denied an opportunity to demonstrate that the racial imbalances in its upper ranks *were not caused* by its pre-1972 hiring practices, Brief for the Department at 25, 31; *see id.* at 27, 28 n.9, is frivolous, *see* Defendants' Motion to Alter or Amend Judgement and Stay of Order at 2-3, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Dec. 27, 1983) (claim that Department was denied opportunity to demonstrate that disparities *were caused* by pre-1972 hiring practices), as is its claim, Brief for the Department at 25 (emphasis in original), that there never has "been a judicial determination that the racial disparity among the ranks were related in any way to findings of discrimination in *hiring* in 1972." *See, e.g., Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

[25] Equally misguided is the Government's attempt to analogize this case to *Bazemore* v. *Friday*, 106 S.Ct. 3000 (1986). *Compare id.* at 3012 ("any racial imbalance existing in any of the clubs was the result of wholly voluntary and unfettered choice of private individuals") *with* Brief for the United States at 35 (in *Bazemore*, "clear that . . . imbalance was traceable, at least in part, to the *de jure* segregated period").

imbalances in the Department — obvious effects of the Department's past discriminatory actions that the consent decrees were designed to eliminate — simply in reaching its conclusion that the consent decrees should be enforced. J.A. 130-36. Such consideration was clearly proper. *Cf. United States* v. *City of Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981) (en banc) ("essential purpose of th[e] quota (parity of minority representation, at a substantial level, between patrol officers and sergeants) has been achieved, and changed conditions have rendered continuance of the quota without modification an inequitable and unnecessary burden on presumably innocent individuals").

B. *The District Court's Enforcement Order Was Appropriately Tailored*

In determining whether race-conscious remedies are appropriately tailored, this Court has looked to factors such as the necessity for the relief, the flexibility and duration of the relief, the relationship of any numerical goals to the relevant labor market, and the impact of the relief on third-parties.[26] When viewed in light of these same factors, the order here is clearly proper.

By turning a blind eye to reality, the Government fails to acknowledge the compelling circumstances that confronted the district court and made the order necessary. By focusing on the one-for-one promotion requirement rather than the conditions under which it applies and the goal at which it is directed, the Government distorts the true fabric of the

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[26] *See Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan, J.); id. at 3054-55 (opinion of Powell, J.); *Wygant*, 106 S.Ct. at 1850-52 (opinion of Powell, J.); *id.* at 1853 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 1857-58 (White, J., concurring in judgment); *id.* at 1864-65 (Marshall, J., dissenting); *id.* at 1869-71 (Stevens, J., dissenting).

remedy. The order is both temporary and inherently flexible. The one-for-one promotion requirement operates only until the Department adopts acceptable promotion procedures or until the goal of 25 percent black representation in each rank has been achieved. Because the order is conditional, the Department may preclude further use of the one-for-one promotion requirement by implementing acceptable promotion procedures. J.A. 136. This is not an abstract possibility. The one-for-one requirement has been used for only one set of promotions, and the district court has provisionally suspended its further use. Even if it were to apply systematically, the one-for-one promotion mechanism would not unfairly or unnecessarily infringe on the legitimate interests of white troopers.

1. *The District Court Had Broad Remedial Authority to Combat Discrimination*

In issuing its order, the district court exercised its equitable powers. Having found that the effects of the Department's pervasive discriminatory practices were continuing despite its consent decree commitments, the "scope of [the] district court's equitable powers to remedy past wrongs [was] broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).[27]

The "choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove* v. *Klutznick*, 448 U.S. 448, 508 (1980) (citation omitted) (Powell, J., concurring). "[H]aving had the parties before it over a period of time, [the district court] was in the

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[27] *See International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).

best position to judge whether an alternative remedy . . . would have been effective in ending [the Department's] discriminatory practices." *Sheet Metal Workers*, 106 S.Ct. at 3056 (opinion of Powell, J.); *cf. Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955) ("[b]ecause of their proximity to local conditions," district courts are in the best position to appraise compliance with constitutional guarantees). Only if this Court concludes that the district court abused its discretion in fashioning a remedy would it be appropriate to reverse the judgment of the court of appeals.[28] No such conclusion is warranted here.

2. *The Order Was Clearly Necessary*

"It is doubtful, given [the Department's] history in this litigation, that the District Court had available to it any other effective remedy." *Sheet Metal Workers'*, 106 S.Ct. at 3056. In 1972, the district court found that the Department had ignored the injunctive order in *Frazer* barring continued discrimination. 340 F. Supp. at 708. In 1975, the district court found that the Department had, "for the purpose of frustrating or delaying full relief to the plaintiff class, artifically

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[28] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (citation omitted) ("the standard of review will be the familiar one of whether the District Court ... abused its traditional discretion to locate a just result in light of the circumstances peculiar to the case"); *see Milliken v. Bradley*, 433 U.S. 267, 288 (1977); *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1560 (5th Cir. 1984) (en banc); *Crockett* v. *Green*, 534 F.2d 715, 718 (7th Cir. 1976). Application of a multi-factor test to ascertain the appropriateness of race-conscious remedies, *see, e.g., Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan, J.); *id.* at 3055-57 (opinion of Powell, J.), is a task calling for considered judgment. Not only do the tests contain several factors to be balanced, but the factors themselves — which inquire into the necessity, flexibility, duration, scope, and burden of the remedy — are not susceptible to mechanical application.

restricted the size of the trooper force." J.A. 34. In 1983, the district court found that the Department, despite its consent decree commitments, was "still without acceptable procedures for advancement of black troopers . . . and it d[id] not appear that any procedures would be in place within the near future." J.A. 133 (emphasis in original). Based on its experience with alternative remedies,[29] and having solicited proposals from the parties, J.A. 123, the district court had no choice but to conclude that "it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action" the effects of the Department's egregious discrimination would "not dissipate within the near future." J.A. 135; *see* J.A. 136.

Instead of acknowledging the situation that faced the district court, the Government creatively reconstructs the facts. As if to suggest that black troopers had been progressing to positions of responsibility in an orderly manner, the Government claims that by 1983, "the results [achieved under the district court's 1972 one-for-one hiring order] had begun to *manifest* themselves in the upper ranks." Brief for the United States at 36 (emphasis added). Taking its rewrite of the record one step further, the Government claims that, because the Department "had already made *substantial progress* in achieving 'racial balance,' the one-for-one promotion quota was unnecessary no matter how the quota's purpose is characterized." *Id.* at 37 (emphasis added).

The very "evidence" the Government cites proves the opposite. The four black corporals to which the Government points were promoted, not on the Department's own initiative, but only as the result of an interim agreement entered simultaneously with the 1979 Decree. Pet. App. 42a; J.A. 41,

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[29] As the district court explained, "In an earlier order this court demonstrated dramatically the efficacy of quotas, over other remedies, in instances where blacks have historically been completely excluded or almost completely excluded from employment. *NAACP* v. *Dothard*, 373 F.Supp. 504 (M.D. Ala. 1974) (Johnson, C.J.)." J.A. 134.

46-48. The Department's 1983 proposal to promote four blacks and eleven white troopers to corporal came only after the district court had prohibited the Department from using a promotion procedure that would have guaranteed that every promotion would go to a white trooper. J.A. 117-24. And the Department's promotion procedures which "brought three additional blacks to the rank of corporal and two to the rank of sergeant," Brief for the United States at 37, were adopted only after the district court had entered its one-for-one promotion order, making it clear that it would not countenance further delay.

The Government's argument that the district court "clearly erred" in rejecting the Department's proposal to promote four blacks and eleven whites, Brief for the United States at 28, is nothing more than a thinly disguised attempt to reassert the claim — resoundingly rejected by the court of appeals — that the district court modified, rather than enforced, the consent decrees.[30] Furthermore, the Government's position ignores

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[30] *Compare* Brief for the United States at 28 (citations omitted)(emphasis added):

> the Department's proposal, as compared with the the extreme quota upon which Paradise insisted, plainly represented the "less intrusive means" ... by which to make the needed promotions *within the spirit of the consent decrees* ... As the Department explained below, its proposal met "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact," *the standard that the consent decrees embodied* ...

with Pet. App. at 10 n.4 (citation omitted):

> Although it was contemplated by the earlier consent decrees that specific numbers of blacks would be promoted, the one-for-one quota was greatly different, in kind and degree. Accordingly, the one-for-one quota is clearly a modification of the prior decrees because it requires more of the Department than simply avoiding ... adverse impact. Thus, the issue here, as in *Stotts*, is whether a "disputed modification of a consent decree" ... may require racial quotas.

not only the district court's legitimate interest in making up for the Department's delay,[31] but also the district court's interest in avoiding "endless enforcement litigation." *Sheet Metal Workers'*, 106 S.Ct. at 3036 (opinion of Brennan, J.). The 1979 Decree required the Department to develop promotion procedures without adverse impact not only for corporals, but also for sergeants, lieutenants, captains, and majors. J.A. 41. In entering its order, the district court made it clear that "any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures *for all ranks*." J.A. 133 (emphasis added).[32] Had it accepted the Department's proposal to promote eleven whites and four

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[31] The Government's contention that "in the four years after the signing of the 1979 Decree, the Department . . . had acted with reasonable diligence," Brief for the United States at 24 n.13, is of very recent origin. Before the district court, the Government pointed out that the defendants had failed for ten months to respond to the Government's request for a proposal for making promotions in conformity with the 1979 Decree and had "failed to offer any reason why promotions should not be made, nor had they offered an explanation as to why they halted progress toward remedying the effects of past discrimination." Pet. App 16a n.10. According to the Government, the Department's conduct "'suggest[ed] that a pattern of discrimination against blacks... may be continuing.'" *Id.* (citation omitted). Furthermore, the Government's attempt to portray the burden on the Department as being particularly onerous, *see* Brief for the United States at 24 n.13, is belied by the Department's recent progress in implementing promotion procedures. After having failed for almost five years to develop a promotion procedure that conformed to its consent decree commitments, the Department developed what it claimed was an acceptable procedure within seven months of the court's order. J.A. 142.

[32] Contrary to the Department's representation to this Court, *see* Brief for the Department at 36, the Department's promotions of white troopers between 1979 and 1983 had not been limited to those made pursuant to the 1979 Decree. *See* Transcript of Proceedings at 21-22, *Paradise* v. *Shoemaker*, No. 3561-N (M.D. Ala. May 27, 1983).

blacks and contented itself with the Department's pledge to develop acceptable corporal selection procedures "as soon as possible," J.A. 126, the district court would have done nothing to prevent continued recalcitrance.

A "district court may adapt the form of the application of its power according to the resistance with which it is confronted." *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, Local 418*, 334 F.2d 1014, 1020 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965). Here, entering an order requiring promotions without adverse impact merely would have reiterated an obligation the Department had already assumed. *See* J.A. 40-41 (1979 Decree); *id.* 50 (1981 Decree). "[T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." *Hutto* v. *Finney*, 437 U.S. at 687.[33]

The Government's "plentiful alternatives" — alternatives it never presented to the district court — are ill-suited to the task the district court was facing . Imposing "stringent contempt sanctions . . . to remain in effect until the Department produced an acceptable long-term promotion plan," Brief for the United States at 25, would not have allowed the Department to meet its immediate "need of at least 15 new corporals." J.A. 130. And, appointing a trustee or administrator "to supervise the Department's progress, or even to make the promotions himself by the proper standard," Brief for the United States at 25, in addition to inevitably fostering delay, would have been far more disruptive of the Department's operations than a

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[33] *Cf. Sheet Metal Workers'*, 106 S.Ct. at 3051 (opinion of Brennan, J.) ("In light of petitioners' long history of 'foot dragging resistance' to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile. Rather, the District Court properly determined that affirmative race-conscious measures were necessary to put an end to petitioners' discriminatory ways.").

directive that allowed the Department to conduct its own affairs subject to the court's review.[34]

In any event, the district court surely was not required to employ remedy after remedy before it reasonably could conclude that race-conscious relief was warranted. *See Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. at 508 (Powell, J., concurring); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974) ("once the goal of increasing the percentage of Blacks in the professions is accepted as either legitimate or compelling ..., the fit between a racial classification and that goal should present no problem"). Such a course was particularly unnecessary here given that the consent decrees themselves called for race-conscious action. In light of the Department's history of obstructionism, "it is fair to conclude that absent authority to" enter its conditional promotion order, "the District Court may have been powerless to provide an effective remedy." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).

3. *The One-for-One Promotion Requirement Is Inherently Flexible, Temporary in Effect, and Geared to the Relevant Labor Market*

The one-for-one promotion requirement is not a rigid remedy. It accommodates "*legitimate* reasons for the

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[34] In addition to potentially requiring an evidentiary hearing for every black trooper on the force, the Government's suggested remedy of competitive seniority confuses a court's power to award individual make-whole relief with its power to order race-conscious measures.

> The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members;

[Department's] failure to" make progress toward eliminating the effects of its unlawful discrimination because it does not mandate unnecessary promotions or require the Department to promote unqualified black troopers. *Sheet Metal Workers'*, 106 S.Ct. at 3052 n.49 (opinion of Brennan, J.) (emphasis in original); *see Fullilove* v. *Klutznick*, 448 U.S. at 488 (requirement of 10 percent set aside for minority business enterprises subject to administrative waiver if minority contractors unavailable); J.A. 128. Furthermore, the one-for-one requirement applies only if the Department fails to develop acceptable promotion procedures for a particular rank pursuant to its consent decree commitments and, then, only if 25 percent of troopers at the rank are not black. *Id.*

The district court has applied the one-for-one requirement sparingly. Used for only one set of promotions to corporal, succeeding promotions to corporal and sergeant were made on the basis of new selection procedures for those ranks, and the one-for-one requirement was suspended. J.A. 163-64, 176-77. In fact, "the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks." Pet. App. 34a. Regardless of whether the Department easily could prove that a promotion procedure for a particular rank would have no long-term adverse impact prior to its implementation, it is clear that "[a]s an enforcement device . . . the one-for-one quota was designed to operate against the Department for a long time to come," Brief for the United States at 24, only in the sense that it was designed to

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no individual is entitled to relief and beneficiaries need not show that they were themselves victims of discrimination.

Sheet Metal Workers', 106 S.Ct. at 3049 (opinion of Brennan, J.).

end permanently the Department's recalcitrance.[35] At most, it lasts as long as the Decrees it was designed to enforce.

The Government's contention that "the one-for-one quota greatly exceeds the percentage of blacks in the relevant labor pool — *viz.*, entry-level troopers eligible for promotion — and thus could not be justified as a flexible 'benchmark'", Brief for the United States at 33, distorts the true character of the order and ignores the district court's need to fashion effective relief. Even if the Department fails to adopt promotion procedures for a rank in compliance with its consent decree commitments, the order imposes the one-for-one mechanism only until blacks are 25 percent of the officers at the rank — a figure that "is directly related to the percentage of [blacks] in the relevant workforce." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).[36] Without authority to employ a flexible mechanism requiring promotions at a rate greater than 25 percent under certain circumstances, the district court would have been without a remedy that ended the Department's resistance and insured future compliance.

Courts often have approved hiring or promotion mechanisms requiring selection of minorities in a proportion

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[35] At the same time that it criticizes the lower court for adopting a remedy that might last "a long time," the Government seems to say that it would have preferred a numerical remedy that would have lasted even longer — one that mirrored the proportion of black troopers at a lower rank. Brief for the United States at 28-29.

[36] The extant court orders require the Department to achieve black representation of 25 percent within the Department as a whole, J.A. 27, and either black representation of 25 percent at each rank above entry-level or adoption of acceptable promotion practices at each rank. J.A. 128. The 25 percent hiring benchmark mirrors the percent of Alabama's population that is black. J.A. 134 n.2. The promotion benchmark of 25 percent at each rank is identical to the hiring goal.

substantially greater than the ultimate goal that is sought to be achieved.[37] In *Sheet Metal Workers'*, this Court approved the lower court's adoption of a 29.23 percent minority incumbency goal, the same as the percentage of minorities in the relevant labor market. 106 S.Ct. at 3031. In doing so, the Court was keenly aware that hiring of minorities necessarily would occur at a rate higher than 29.23 percent if the incumbency goal were to be achieved in the foreseeable future.

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[37] *See, e.g, Kirkland* v. *New York State Dep't of Correctional Serv.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (Title VII case; as interim measure until validated selection procedures implemented, all promotions to be offered to qualified minorities until minority appointments equal 21 percent of rank); *Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979) (Title VII case; as interim relief pending development of non-discriminatory exam, twelve black firefighters ordered immediately promoted to fire captain, twelve whites to be promoted at discretion of district court); *United States* v. *City of Chicago*, 573 F.2d 416 (7th Cir. 1978) (Title VII case; until validated tests developed and used, all minorities on current eligibility lists to be offered permanent promotions before whites on lists may be promoted); *Crockett* v. *Green*, 534 F.2d 715 (7th Cir. 1976) (Equal Protection case; one-for-one appointments to skilled craft positions until percentage of blacks in job classification matches that of blacks in city population (17.2 percent)); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *aff'd* , 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (Equal Protection case; one for one hiring quota until 15 percent minority patrolmen); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (Title VII case; one-for-one promotion ratio until at least 15 of 100 foremen are black); *Vulcan Society of New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n of New York*, 490 F.2d 387 (2d Cir. 1973) (Equal Protection case; one for three hiring ratio upheld as interim relief until validated selection procedure implemented); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (Equal Protection case; one for one, two, or three hiring ratio, at discretion of district judge, until current pool of eligibles exhausted; new, validated examination to be expeditiously developed); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972) (Equal Protection case; one for two hiring until 20 minority fire-fighters hired).

See, e.g., id. at 3062 (opinion of O'Connor, J.).[38] Similarly, in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court approved a voluntary agreement between a company and a union providing that 50 percent of new trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force — 39 percent. *Id.* at 198. The Court found that the plan was carefully drawn to break down "old patterns of racial segregation and hierarchy." *Id.* at 208. Given the conditional nature of the one-for-one requirement here and its suspension after only one use, it is clear that it is far less rigorous in nature or operation than comparable mechanisms approved in many other cases.

Whether this Court believes that, for example, a two-for-three or a three-for-four requirement would have served the purpose of the district court's one-for-one order equally well is not the question. Every numerical remedy "necessarily involve[s] a degree of approximation and imprecision."

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[38] In *Sheet Metal Workers'*, approximately 45 percent of newly indentured members were non-white. 106 S.Ct. at 3031 n.18. Previously, the district court had established a one-minority-for-one-white hiring mechanism to remain in effect until the 29.23 percent membership goal had been achieved. *Id.* at 3031. Although the court of appeals set aside the one-for-one hiring requirement, it recognized that "temporary hiring ratios may be necessary in order to achieve integration of a work force from which minorities have been unlawfully barred." *EEOC* v. *Local 638 ... Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1188 (2d Cir. 1985), *aff'd*, 106 S.Ct. 3019 (1986). The court of appeals set aside the one-for-one mechanism because "petitioners had voluntarily indentured 45% nonwhites since January of 1981" so that "the Court concluded that a strict one-to-one hiring requirement was not needed to insure that a sufficient number of nonwhites were selected for the apprenticeship program." 106 S.Ct. at 3031 n.18. Here, by contrast, the district court and the court of appeals concluded that the one-for-one promotion mechanism was necessary.

Teamsters v. *United States*, 431 U.S. at 372. "This Court . . . appropriately deal[s] with the large constitutional principles; other federal courts ha[ve] to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 6; *see Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).

4. *The Order Has a Limited Impact On White Troopers*

"As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S.Ct. at 1850 (opinion of Powell, J.). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove* v. *Klutznick*, 448 U.S. at 484 (opinion of Burger, C.J.), *quoting Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 777 (1976).

The burden in this case is extremely light and upsets no legitimate expectations of white troopers for promotion. To accept the Government's contention that the district court's order is too intrusive merely because it "casts its onus not on the general public, but on a finite . . . number of identifiable individuals," Brief for the United States at 39, would be tantamount to adopting the "simplistic" conclusion that race-conscious promotion remedies can never "withstand constitutional muster." *Sheet Metal Workers'*, 106 S.Ct. at 3057 n.3 (opinion of Powell, J.).

Notwithstanding the attempt by the Department to lure this Court into believing otherwise, *see* Brief for the Department at 14, 29, 32, the district court's order does not compel the Department to promote unqualified black troopers at the expense of more qualified white troopers. The district court's one-for-one promotion requirement applies only if the Department fails to adopt acceptable promotion procedures

and, even then, only "if there is a black trooper objectively qualified to be promoted." J.A. 128. Expectations of promotion, such as those harbored by intervenors here, based on invalid, discriminatory selection procedures[39] are entitled to little weight. As the court of appeals explained in an earlier phase of this case:

> [N]o applicant for public employment can base any claim of right under the Fourteenth Amendment's equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such

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[39] The Department never actually claimed that its procedure for selecting troopers for promotion to corporal that was found wanting by the district court was valid. Rather, the Department claimed only that its written test — one of four components of the corporal selection process — was valid. *See, e.g.*, Motion for Reconsideration at 2-3, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Nov. 10, 1983); *see also* Motion of Department of Public Safety for Reconsideration and to Alter, Modify or Amend January 13, 1984 Order at 7, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Jan. 23, 1984) (after analyzing other "factors in the promotional procedure, it is now apparent other alternatives and combinations must be explored"). And, even if it had claimed, and demonstrated, that the entire selection process were valid, the point would have been of little consequence for reasons quite apart from the "no adverse impact" provisions of the consent decrees. Before using a job-related test that has adverse impact, an employer must determine that there are no reasonable, alternative procedures available. *See* 29 C.F.R. § 1607.3.B. The wisdom of this requirement is graphically illustrated in this case. As soon as the Department was told that the court would tolerate no more delay, it developed a corporal selection procedure that it claimed was valid but had no apparent adverse impact. J.A. 142; Pet. App. 45a. Similarly, the Department developed a procedure for the selection of sergeants that it claimed was valid and, again, had no apparent adverse impact. *See* Statement of Completion of Procedure for Promotion to Rank of Sergeant, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Aug. 16, 1984); J.A. 176-177; Pet. App. 7.

> criteria have not been shown to be predictive of successful job performance. Hence, there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected. Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.

NAACP v. *Allen*, 493 F.2d at 618.[40]

Like the hiring goal in *Sheet Metal Workers'*, the conditional promotion requirement in this case results in a "[d]enial of a future employment opportunity," not the "loss of an existing job." *Wygant*, 106 S.Ct. at 1851 (opinion of Powell, J.). Even if suspension of the one-for-one requirement were lifted and the requirement were employed systematically until the 25 percent goal had been achieved, no white trooper would lose a job or be demoted, and substantial promotion opportunities for white troopers would continue to be available.[41]

Unlike the preferential layoff scheme in *Wygant*, the conditional promotion requirement here has, at most, a trivial

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[40] In addition, the Department planned to use the "rule of three" as provided in the Alabama Merit System Law in making promotions. *See supra* note 13. Thus, even if the Department's selection procedure had been valid, the first person on the promotion list would have had no "right" to a promotion. Since the district court's order was entered, the "rule of three" has been replaced by the "rule of ten." *See id.*

[41] The intervenors misconstrue the district court's order when they imply that it bars white troopers from advancing. *See* Brief for the Intervenors at 11, 17. On the one occasion the one-for-one promotion mechanism was used, eight white troopers were promoted. Pet. App. 22a. The only effect on white troopers was a temporary reduction in the number of promotion opportunities available.

impact on any expectations of promotion white troopers may have on the basis of their seniority. Whatever part seniority normally may play "in allocating benefits and burdens among employees," *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239 (1982); *see Franks* v. *Bowman Transportation Co.*, 424 U.S. at 766-67, it has an insignificant role in this case.[42] Given that white troopers have "no legitimate expectation of promotion" on the basis of their seniority, this case is "closer to the hiring case, since, although there may occasionally be some inequity, nonminority employees are not deprived of a benefit that they had reason to expect." Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 Mich. L. Rev. 1, 40 (1975) ("easier to order preferential remedy" where promotions not made on basis of seniority); *see* Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. at 67 ("promotion resembles hiring in the sense that dispreferred white does not lose an existing job;" however, where seniority plays "a significant role in promotion decisions, overriding that criterion can produce the same sense of grievance ... as ... in the layoff setting").[43]

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[42] Differences in seniority could account for no more than a three percent difference in final ratings of candidates for promotion to corporal. *See supra* note 10. *But cf.* Brief for the Intervenors at 17 ("only natural for [white troopers] to expect that many years of service will result in the ultimate reward: promotion"); Brief for the United States at 39-40 (emphasizing role of seniority in promotion decisions and in creating expectations of promotions).

[43] Because seniority plays a trivial role here, the Court need not determine the circumstances under which "employee expectations arising from a seniority system" must give way to the "strong public policy interest" in eliminating the effects of pervasive discrimination. *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 778. Nor need the Court weigh the degree to which seniority-based expectations must be tempered by the fact that white employees with long tenure are those whose hopes of

In sum, the order below does not "unnecessarily trammel the interests of white employees," *Weber*, 443 U.S. at 208 (opinion of Brennan, J.), or cause a "serious disruption" in their lives. *Wygant*, 106 S.Ct. at 1851-52 (opinion of Powell, J.). The burden on white troopers is small, and their legitimate expectations of promotion are not substantial. Failing to achieve a promotion in this case is far more comparable to not being hired than it is to losing an existing job.

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promotion are most likely the "product [ ] of discrimination and hence tainted." *University of California Regents* v. *Bakke*, 438 U.S. 265, 365 (1978) (opinion of Brennan, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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It is not hard to see why respondents and their amici should devote so many words and such lofty rhetoric to questions of law not properly before this Court and to questions of fact not raised by the record below. Respondents and amici have much to say about the propriety as a general and abstract matter of numerical race-conscious relief, about the desirability of having black officers in the upper ranks of a police force to satisfy "operational needs," and about the lamentable role of the Alabama State Troopers in the civil rights struggles of the sixties. But respondents and amici have remarkably little to say about the precise and narrow issue on which this Court granted certiorari: whether in the particular context of this case—a context that included an alternative proportional promotion schedule offered by the defendants and acquiesced in by the United States—the district court's order of a one-for-one quota was sufficiently "narrowly tailored" to satisfy the demands of strict scrutiny under the Equal Protection Clause.

1. Before all it is imperative to keep in sight the fact that the district court ordered the one-for-one promotion quota in the face of an offer by the Department of Public Safety to effect the next batch of promotions by promoting four blacks and eleven whites. This offer was made in response to the district court's order—the order that furnished the occasion for this phase of the litigation—that the Department submit "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123). The district court not only rejected the Department's offer, but stated that, had the moving plaintiffs argued "that all 15 of the new corporals should be black," it would have been inclined to grant that request too (Pet. App. 61a n.1). Now on another day in another case there may be occasion to inquire whether a promotion schedule like that offered by the Department is necessary and appropriate to comply with a consent decree requiring that an employer maintain a promotion system that "will have little or no adverse impact upon blacks" (J.A. 40). But in the instant case the question is not whether resort to race-conscious relief is permissible as a general matter; the consent decrees, whose validity is unquestioned here, by their terms "mandated race-conscious promotion procedures" (Resp. Br. 22). The district court was thus confronted with *alternative* race-conscious promotion proposals, and the question in this case is whether the one that it adopted was "narrowly tailored" within the meaning of this Court's decisions.

When all the smoke generated by our opponents' rhetoric clears, one is surprised to conclude that they seem in large measure to agree with our basic position. Respondents effectively concede that the one-for-one quota should be tested under "strict scrutiny" (Br. 17-18); they seem to agree that the quota cannot be defended as a mere effort to promote "racial balance" (*id.* at 25); and they

appear to concede that the quota's legitimacy must be gauged by analyzing it as a measure designed to "enforc[e] the Department's consent decree commitments" (*id.* at 18, 20, 25, 26). Against this backdrop of consensus, our contention is a simple one—that the district court's imposition of a one-for-one quota was not an appropriate method (indeed, was scarcely even a rational method) of enforcing the Department's consent decree commitments, and hence it served no legitimate function; when compared with the Department's own proposal, the one-for-one quota thus stands revealed as a harsh and ill-considered gesture of impatience rather than a remedy carefully tailored to avoid unnecessarily trammelling the rights of innocent white candidates.

One might say that respondents in a sense agree even with this latter contention of ours because they seem to concede that the one-for-one quota imposed at the time of February 1984 promotions had no intrinsic appropriateness. Respondents seek to justify that quota principally on the grounds that it was "temporary" and "conditional" (Br. 27). So one is moved to ask: temporary until *when,* and conditional upon *what*? And the astonishing answer that comes from those who oppose us is that the time is July 27, 1984, and that the promotions carried out on that date were quite sufficient to satisfy the condition. But that set of promotions, which advanced three blacks and ten whites to the rank of corporal (Pet. App. 47a; J.A. 160, 163-164), was no more favorable to blacks—indeed, it was marginally less favorable to blacks—than the four-for-eleven promotion schedule originally offered by the Department, acquiesced in by the United States, and rejected by the district court in favor of the one-for-one quota that we challenge today. Respondents thus defend the quota, not intrinsically, but as a device to get the Department to do what it had already declared itself ready and willing to do.

2. Respondents seek to extricate themselves from this dilemma by raising the spectre of the Department's "history of recalcitrance" (Br. 13) and "history of obstructionism" (*id.* at 33), asserting that extreme measures were needed to overcome such resistance. We are quick to acknowledge that the Department's history—including some events long past—lends surface appeal to this argumentative tack. The Alabama Department of Public Safety unquestionably behaved shamefully during the civil rights struggles of the sixties; it was properly found guilty of racial discrimination in 1972; and it was properly reprimanded for foot-dragging in remedying that discrimination in 1975. But the propriety of the one-for-one promotion quota must be assessed as of the date on which it was imposed, and we do not think that the Department in December 1983 could fairly be charged with recalcitrance or with operating what amicus calls a "regime of racism" (Lawyers' Comm. Amicus Br. 7, 12).

As of December 1983, the Department had faithfully complied with the one-for-one hiring quota for eight years, to the point where the overall trooper force was "approximately 22%-23% black" (J.A. 62).[1] The Department signed a consent decree respecting promotions in 1979, and the record shows that during the ensuing four years the Department was continuously engaged in efforts to satisfy the dual requirements—concerning "validation" and "no adverse impact"—that the consent decree imposed. Consistently with the 1979 "Agreement of Counsel" (J.A. 46-48), the Department promoted four blacks and

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[1] The Lawyers' Committee as amicus asserts (Br. 6) that "[t]he Department has continuously frustrated [the district court's 1972] order." While the Department concededly sought to frustrate the district court's 1972 order until 1975, there is absolutely no evidence in the record that it did so after 1975. Indeed, it appears that the percentage of blacks in the overall trooper force has now reached parity (25%), so that the specific objective of the district court's 1972 order has now been accomplished. See U.S. Br. 4 n.1.

six whites as an interim measure (J.A. 62) and proceeded to develop a new corporal's examination that was submitted for approval in April 1981 (Pet. App. 12a & n.8). The parties disagreed about the examination's validity, as the 1979 decree had contemplated that they might do (see *id.* at 69a), and the parties accordingly signed a second consent decree in 1981. As required by the latter decree, the Department administered and scored the corporal's examination, then analyzed its results to ascertain whether it had an "adverse impact." When Paradise and the United States protested that it did, the Department offered to rectify the imbalance by promoting blacks at a 20% rate commensurate with their availability (J.A. 61). When Paradise rejected this offer (*ibid.*) and moved for enforcement of the decrees, the Department promptly responded with a proposal to promote four blacks and eleven whites, a proposal that squarely satisfied the district court's order that it submit a plan to promote "at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123). And after the district court rejected *that* offer and instead imposed the one-for-one quota that we challenge, the Department promptly submitted procedures for promotions first to corporal and then to sergeant, procedures that the district court has provisionally approved. See U.S. Br. 12-13 & n.5.

This history does not smack of recalcitrance or obstructionism. The chief fault that may be laid at the Department's door after 1979 was its failure to submit, within the promised one-year period, a procedure for corporal promotions that complied with the 1979 decree. See U.S. Br. 5-6; Resp. Br. 22-23. But this tardiness cannot be thought to evidence "recalcitrance" given the difficulty of the task that the Department had undertaken. The 1979 decree required that the promotion procedure both be validated as job-related under the *Uniform Guidelines* and "in addition, * * * have little or no adverse impact on blacks"

(J.A. 40). As the district court itself recognized in declining to require validation of the Department's hiring procedures in 1972, the validation process alone can "take several years." *NAACP* v. *Allen*, 340 F. Supp. 703, 706 (M.D. Ala. 1972). And as the parties recognized below (Pet. App. 66a), the existence of an "adverse impact" cannot be determined until a promotion procedure, once developed, has actually been administered and its results scrutinized. The Department's pledge to accomplish this within a year might well be thought ambitious, and there is nothing in the record to suggest that its failure to meet that deadline evidenced bad faith.[2]

Whatever construction is put on the Department's failure to meet its deadline, respondents still do not explain why a one-for-one quota should have been imposed instead of the four-for-eleven schedule that the Department proffered. Respondents suggest by their rhetoric that

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[2] Respondents suggest (Br. 31 n.31) that recalcitrance may be inferred from the fact that, "[a]fter having failed for almost five years to develop a promotion procedure that conformed to its consent decree commitments, the Department developed what it claimed was an acceptable procedure within seven months" after the one-for-one quota was imposed. This suggestion borders on the disingenuous. In approving in July 1984 the Department's proposal to promote three blacks and ten whites, the district court concluded that that selection procedure satisfied *one* of the Department's consent decree commitments, *viz.*, the requirement that promotions be made with no adverse impact on blacks. Of course, the Department's earlier proposal to promote four blacks and eleven whites would have satisfied that requirement just as well. The district court, however, did *not* conclude that the July 1984 procedure satisfied the *second* of the Department's consent decree commitments, *viz.*, the requirement that the procedure be validated as job-related. To the contrary, the court directed the parties to "proceed with discovery on the issue whether the selection procedure * * * can be validated as job-related pursuant to *The Uniform Guidelines* * * * and thus shown to be in compliance with the 1979 and 1981 consent decrees" (J.A. 164). As noted in the text and in our opening brief (at 24-25 n.13), the validation process is extremely time-consuming.

the quota was needed to goad the Department into making the concededly satisfactory responses that it has made since the one-for-one quota entered the picture. But if that is respondents' argument, it falls of its own weight. The concededly satisfactory responses that the Department has since made consist of promoting three blacks and ten whites to corporal and promoting two blacks and eleven whites to sergeant. See U.S. Br. 12-13 & n.5. But those responses were no more consistent with the consent decree's no-adverse-impact standard than was the Department's original proposal to promote four blacks and eleven whites, an offer that the district court rejected. If the district court saw fit to suspend the one-for-one quota for the July and August promotions, it is hard to see why the quota had to be applied to the February promotions either—except perhaps as a symbolic gesture to show that the district court really meant business. We think that this Court's decisions requiring that race-conscious remedies be tested by "strict scrutiny" require something more than this.

3. Even if respondents had demonstrated a need for a remedy with *in terrorem* aspects, the one-for-one promotion quota would nonetheless be impermissible. In judging whether race-conscious remedies are "narrowly tailored," a court must consider "whether lawful alternative and less restrictive means could have been used." *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 11 & n.6 (opinion of Powell, J.). In our opening brief (at 23-30), we emphasized that less restrictive alternatives were plainly available to the district court: it could have accepted the Department's offer to promote four blacks and eleven whites, solving the immediate need to promote 15 corporals "within the spirit of * * * the parties' consent decrees" (J.A. 59); and, if an *in terrorem* message were also judged necessary, it could have imposed fines or other sanctions (such as the appointment of an ad-

ministrator) pending the Department's development of an acceptable long-term promotion plan. We noted also that race-neutral devices could have been used to expedite the progress of blacks into the Department's upper ranks, such as modification of the Department's time-in-grade or promotion-from-within rules. See U.S. Br. 35 n.17.

Respondents and amici make no serious effort to demonstrate the inefficacy of these alternatives. Respondents assert that adoption of the Department's four-for-eleven proposal, standing alone, "would have done nothing to prevent continued recalcitrance," and that the imposition of sanctions, standing alone, "would not have allowed the Department to meet its immediate need of at least 15 new corporals" (Resp. Br. 32). This statement is quite beside the point, for we suggested that these remedies be invoked, not in isolation, but in conjunction. Respondents (Br. 32), joined by amicus Lawyers' Committee (Br. 8, 20, 25, 26-27), assert that appointment of an administrator or modification of time-in-grade rules would have been constitutionally objectionable because "more intrusive on the Department." But this Court's decisions mandating consideration of less intrusive alternatives to racial quotas plainly require a focus on alternatives that are less *racially* intrusive; "intrusiveness" must be judged by impact upon the disadvantaged racial group, not upon the employer as an institution. And we know of no support whatsoever for the idea that racial quotas are to be preferred to fines as a means of enforcing consent decrees, on the theory that "[m]oney sanctions would harm only [the state's] taxpayers" (Lawyers' Comm. Amicus Br. 25).[3]

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[3] Other amici make equally inaccurate statements about the availability of alternative remedies. The City of Birmingham asserts that the district court in 1983 was "faced with the two unacceptable alternatives" of "an outright ban on * * * promotions, or continued use of a discriminatory selection procedure" (Br. 26 (original quotations omitted)). That statement is doubly flawed: none of the Department's selection procedures for promotion has ever been found to be

4. In our opening brief (at 30-35), anticipating a possible argument of respondents, we urged that the one-for-one quota could not be independently justified as a measure designed to achieve "racial balance." Although respondents and amici speak of the desirability of racial balance as a long-term societal goal, we do not understand them at the end of the day to rely on racial balance to justify the district court's application of the one-for-one promotion quota. As we have said, respondents praise the quota as strictly "temporary" and "conditional" and emphasize that it "has been used for only one set of promotions" (Br. 27). The irrelevancy of the quota's efficacy in achieving racial balance is thus effectively conceded, and we see no need to reiterate our arguments on this score.[4]

"discriminatory," and the district court in any event was faced with other lawful alternatives, most notably the Department's four-for-eleven proposal. The NAACP Legal Defense Fund asserts (Br. 11-12) that "[p]lainly the court below considered the availability and efficacy of other remedies." The court below plainly did not; at least it did not consider them in its written opinion.

[4] Although respondents seem to agree that the furthering of racial balance is not a compelling governmental interest, they suggest at one point that the "racial imbalances" in the Department's upper ranks are "obvious effects" of past discriminatory practices, and that the one-for-one quota is justifiable as an attempt to eliminate such alleged "effects" (Resp. Br. 25-26). Apart from the fact that the consent decrees themselves, in mandating the implementation of a proportional promotion procedure, already contained a mechanism to expedite blacks' progress into the Department's upper ranks, respondents' argument in any event is incorrect. As we discussed in our opening brief (at 30-35), this Court made clear last Term that race-conscious remedial efforts are appropriate only to remove continuing barriers, such as "informal mechanisms [that] obstruct equal employment opportunities" (*Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 24 (plurality opinion)), rather than to bring about some ideal racial balance that would theoretically have existed if the employer had never discriminated at all. See, *e.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 587-588 (1984) (O'Connor, J., concurring) ("[A] court may use its remedial powers * * * only to prevent

5. Whereas respondents seek to justify the one-for-one quota as a mode of "enforc[ing] the Department's consent decree commitments" (Br. 25), amici proffer various alternative rationales. The Lawyers' Committee urges that the quota satisfies strict scrutiny because it was designed to eradicate a supposed "institutional bias" against black candidates for promotion (Br. 7, 8, 12, 16, 18, 20, 24, 25). This argument aims to capitalize on this Court's observation in *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), that "the lingering effects" of past discrimination may include "informal mechanisms [that] obstruct equal employment opportunities," such as an old-boy network that frustrates black applicants (slip op. 24, 51-52 (plurality opinion), cited in Lawyers' Comm. Amicus Br. 11). Amicus would have this Court believe that the district judge made findings of fact concerning the existence of "institutional bias," then carefully tailored a remedy in the form of a one-for-one quota specifically to address that problem. Indeed, amicus asserts that "[t]he district court's choice of this ratio • • • [was] based on its conclusion that institutional bias persists" (Br. 21) and "was based on its determination • • • that lesser measures could not adequately and expeditiously dismantle the Department's institutional bias" (*id.* at 8).

Amicus has made all of this up out of whole cloth. The words "institutional bias" recur at least twenty times in amicus's brief; one searches the record in vain for that phrase. The truth is that this argument was not raised by

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future violations and to compensate identified victims of unlawful discrimination.") (citations omitted). Cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 28 (1971) ("When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments."); *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), slip op. 2-3 (White, J., for the Court).

any party below and was neither relied on nor mentioned by either court below. The issue of promotions has been addressed exclusively in consent decrees and never at trial, and no evidence has even been submitted about the existence of "informal mechanisms" or "institutional bias" that might impede blacks' access to the upper ranks of the Department. The pattern of promotions since 1979 surely suggests no inference of "institutional bias," for each set of promotions to corporal since 1979 has been at least proportional as between blacks and whites. Because the district court was faced with no allegations of "institutional bias," and because the Department *a fortiori* has had no opportunity to rebut such allegations, it is not possible here to assess whether the elimination of "institutional bias" would be a compelling governmental interest. Nor is it possible, in the absence of any factual predicate, to determine whether a one-for-one promotion quota would qualify as "narrowly tailored" to address such an objective.

Much the same can be said of the argument, advanced by several amici, that the one-for-one quota satisfies strict scrutiny because it was designed to meet the "operational needs" of the Alabama Department of Public Safety, such as the need to assure good community relations. See Lawyers' Comm. Amicus Br. 18; New York Amicus Br. 3, 8-9; Detroit Amicus Br. 5-16; NAACP Legal Defense Fund Amicus Br. 33-35. This argument apparently seeks to capitalize on Justice Stevens' dissent in *Wygant*, where he suggested that the exigencies of law enforcement may sometimes rationalize race-conscious classification. "To take the most obvious example," Justice Stevens wrote, "if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class" (slip op. 2-3). "Similarly," Justice Stevens continued, "in a city with

a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order" (*id.* at 3).

The short answer to amici's argument is that this "operational needs" theory, like the "institutional bias" theory, was not advanced by any party and was not addressed by either court below. Even if there were a factual predicate for this argument, which there is not, the argument could not be presented, least of all by an amicus, for the first time in this Court. There is thus no occasion for the Court here to consider if and when the satisfaction of a law enforcement agency's operational needs might be a "compelling governmental interest" justifying race-conscious classification, or whether a one-for-one promotion quota could ever qualify as "narrowly tailored" to achieve such a goal.[5]

6. Respondents and amici seek to minimize the impact of the one-for-one quota on white competitors for promotions, and to assimilate that burden to the more diffuse burden found by this Court to be acceptable on occasion in the case of race-conscious remedies at the hiring stage. Respondents are far from appreciating the real harm that this quota inflicts. One must consider both "the *effect*

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[5] We note that, if a race-conscious promotion scheme could ever be defended on "operational needs" grounds, that scheme would have to be adopted in the first instance by the law enforcement agency itself, as necessary in its view to the successful discharge of its responsibilities. Moreover, because the "operational needs" theory seeks to justify race-conscious relief on grounds other than remedying prior discrimination and its effects, we have serious doubts whether that theory would ever authorize the imposition of a race-conscious promotion quota. Cf. *Wygant*, slip op. 7 (plurality opinion) (rejecting role model theory since it "does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices"); *id.* at 5 (O'Connor, J., concurring) (same).

* * * and the *diffuseness* of the burden imposed on innocent nonminorities." *Sheet Metal Workers*, slip op. 6 n.3 (Powell, J., concurring (emphasis added)).

The one-for-one quota is objectionable in both respects. The effect of the quota is to frustrate innocent persons' legitimate promotional expectations; contrary to respondents' suggestion (Br. 9 & n.10, 41 & n.42), those expectations are not based on seniority alone, but are premised on the right to be considered for civil service promotion based on one's merit rather than on the color of one's skin. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) ("Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic."). And the impact of the quota, while not focused uniquely upon a single individual, is plainly not diffused "among society generally," as may be true when hiring is involved (*Wygant*, slip op. 14-15 (opinion of Powell, J.)). The individuals passed over by operation of the instant quota were readily identifiable, particularly since the Department normally made promotions in rank order (subject to the "rule of three") based on competitive results.[6] And whereas an individual at the hiring stage typically has the option of applying for many jobs, a

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[6] Under the "rule of three," the Department considered "three ranking eligibles" for a promotion, "and, if more than one vacancy [was] to be filled, the name of one additional eligible for each additional vacancy." Ala. Code § 36-26-17 (1975), cited in Resp. Br. 12 n.13. Thus, if the Department sought to fill 15 vacancies, it would consider the 17 highest-ranked candidates. Although this of course means that a highly-ranked candidate under the Department's merit system has no absolute guarantee of promotion, that does not make the disruptive effect of the promotion quota "diffuse." The burden of a race-conscious layoff scheme would not be called "diffuse" merely because the 15 white workers to be fired were chosen by lot from a list of 17 names.

trooper-level employee hoping for promotion in the Alabama Department of Public Safety has only one job for which to apply, and that is the job of corporal.

7. Finally, respondents seem to suggest (Br. 27) that the district court was free to dispense with all measure of consideration and restraint because it was simply enforcing a consent decree to which the Department had previously agreed. To lend color to this suggestion, respondents stress the district court's closeness to the case and its familiarity with local conditions. Decisions to impose racial quotas, respondents say, should be reviewed under an abuse-of-discretion standard (Br. 28), like decisions about misjoinder of parties.

A district court's enforcement powers, alone or strengthened by a tincture of local expertise, cannot serve as a universal solvent, doing away with all constitutional limitations. A district court generally has wide latitude in declaring remedies; but when the remedy discriminates on the basis of race, the court's action must be closely examined. Strict scrutiny would not be strict if race-conscious remedies were scanned only to see if discretion had been abused.[7] Respondents rather cavalierly dismiss the rights of white applicants for promotion, suggesting that this case really comes down to numbers and that, when it comes to numbers, one can give or take a few

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[7] Respondents cite *Fullilove* v. *Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring), for the proposition that a district court's remedial powers are somehow immune from the constitutional limitations that would otherwise apply. See Resp. Br. 27-28. But Justice Powell there cautioned that district courts must exercise their remedial powers "within appropriate constitutional or statutory limits" (*ibid.*). One of the basic constitutional limits on racial classifications is that they may not be used unless they are narrowly tailored to accomplish a compelling governmental purpose. This Court has never suggested that racially discriminatory devices are merely one of many options in a judge's remedial arsenal, to be employed or not as he sees fit in a simple exercise of discretion. If effective, non-racial alternatives are

without its much mattering. Whether a different array of numbers "would have served the purpose of the district court's one-for-one order equally well," respondents assert, "is not the question" before this Court (Br. 37). To the contrary, if strict security means what we believe it means, that emphatically *is* the question. Although respondents properly recognize that the dispute before this Court is a narrow one, they err in trivializing the importance of the constitutional principles at stake.

For these reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed with respect to the question presented.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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available, racial discrimination is by definition unnecessary and thus under strict scrutiny constitutionally impermissible. Indeed, this Court reaffirmed just last Term that the same constitutional test applies to judicial action as to other state action. See *Sheet Metal Workers*, slip op. 50-51 (plurality opinion); *id.* at 4 (Powell, J., concurring). And the Chief Justice's opinion in *Fullilove* stressed that the "limited remedial powers of a federal court" are *more* constrained than those of Congress (448 U.S. at 480, 483).

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In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILLIP PARADISE, JR., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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RULES AND REGULATIONS

Supreme Court Rule No. 36 1

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner. Consent to the filing of this brief has been granted by counsel for all parties. The letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California

for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Eleventh Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 767 F.2d 1514 (11th Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue of whether the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution tolerate race preference in the form of a one-black-for-one-white promotion quota.

This suit was originally brought by the National Association for the Advancement of Colored People in 1972 against the Alabama Department of Public Safety alleging discrimination in hiring against blacks who sought jobs as state troopers. Based on its finding of intentional hiring discrimination, the District Court issued an injunction ordering the department to hire one black trooper for each white trooper hired until blacks comprised 25% of the state trooper force. In 1975, the District Court made a finding that the state had artificially restricted the size of the trooper force in order to frustrate the court's 1972 order. An injunction was issued prohibiting the department from frustrating the hiring quota.

A consent decree was then entered in 1979. Settling other issues as well, the consent decree required the state to develop fair promotion procedures that were racially neutral and when used for either screening or ranking would have little or no adverse impact on blacks. The promotion procedures were to conform to the 1978 Uniform Guidelines on Employee Selection Procedures.

After two years, the department moved for the approval of a written examination for promoting corporals. This examination had not been validated in accordance with the standards set forth in the Uniform Guidelines of Employee Selection Procedures as required in the consent decree. The United States took the position that the procedures had an adverse impact on blacks, that is, the passage rate for blacks was less than 80% of the passage rate for whites. However, in a second consent decree, the

parties agreed that the examination would be given and scored. Based on the scores and other factors, the applicants would be ranked on a promotion register. The selection procedure would then be examined for possible adverse impact on blacks. If the parties could not agree on an appropriate promotion procedure, the matter would be submitted to the court for resolution.

Two hundred sixty-two applicants took the October, 1981, written examination, of whom sixty were blacks. Only 5 blacks were ranked among the top half and the highest rank was number 80. The United States again took the position that the promotion procedure had an adverse impact on blacks. Based on this finding of adverse impact and because the department was still without acceptable promotion procedures, but without a finding of intentional discrimination, the District Court "enforced" the consent decree by requiring a one-black-for-one-white promotion quota until blacks held 25% of the positions in each of the promotional ranks or until another promotion plan was approved by the court. This order was affirmed by the Court of Appeals even though there were no "finding[s] of discrimination in promotions, and, perforce, no specific victims of promotion discrimination have been identified." *Paradise,* 767 F.2d at 1527. *See also* 767 F.2d at 1530.

The petitioner argued below that the imposition of a one-black-for-one-white promotion quota was a violation of the Fourteenth and Fifth Amendments. Affirming the District Court, the Court of Appeals held that promotion quotas did not violate the Constitution. It used the standard that "if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have

been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of remedying the present effects of the past discrimination," *id.* at 1531, then the use of racial classification will be upheld. In effect, the Court of Appeals balanced the need to redress past discrimination against the need that the remedy be " 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.*

Applying this standard, the Court of Appeals affirmed the promotion quota. The court found: (1) that the promotion quota "is substantially related to the objective of eradicating the present effects of past discrimination, and extends no further than necessary to accomplish the objective," *id.* at 1532-33, (2) the quota is a temporary measure, *id.* at 1533, and (3) the quota "does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper. Moreover, only qualified black troopers may be promoted . . . and white troopers are not barred by it from advancement . . . ." *Id.*

SUMMARY OF ARGUMENT

The judicially imposed promotion quota grants racial preference to minorities and violates nonminorities' rights to equal protection of the laws under the Fourteenth and Fifth Amendments.

This Court has never approved the explicit use of race as a "remedy" in the absence of "judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring). In this case there was no finding by the District Court, or anyone else, that intentional discrimination took place in promotions. Nor was the court's adoption of the promotion quota designed or intended to remedy identified discrimination; rather, it was designed solely to propel blacks into the upper ranks. Only a finding of racially based discrimination can support a race-conscious remedy such as this. Absent such a finding, nonminorities' constitutional rights to be treated as individuals are at stake.

Because there is no finding of intentional discrimination in promotion, the promotion quota invoked below must stand or fall on its own merits or lack thereof. The only evidence presented was the finding of discrimination at the hiring level. The promotion quota cannot withstand an examination under the strict scrutiny test, the test relevant in determining the validity of discrimination based on race.

Absent a finding of racially based discrimination, a government imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The Fifth and Fourteenth Amendments protect individual rights and do not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

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ARGUMENT

I

THE FOURTEENTH AMENDMENT FORBIDS THE ADOPTION OF EXPLICIT RACIAL CLASSIFICATION ABSENT ADEQUATE FINDINGS OF PAST DISCRIMINATION

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction, the equal protection of the laws."[1] The Equal Protection Clause does not mention any of the characteristics that divide a nation, such as race, religion, or national origin. It sees only "person[s]" and guarantees to every "person" the "equal" protection of the laws.

This Court has traditionally renounced distinctions between citizens solely because of their ancestry. In one of this Court's most famous dissents, Justice Harlan wrote in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896):

> "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

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1 Through the Due Process Clause of the Fifth Amendment, equal protection safeguards analogous to those of the Fourteenth Amendment are applicable to actions of the federal government and its agencies, including the judicial order before the Court, and prohibits the federal government from discriminating between individuals or groups. *Fullilove v. Klutznick*, 448 U.S. at 496 (Powell, J., concurring); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Recently this Court in *Wygant v. Jackson Board of Education,* — U.S. —, 54 U.S.L.W. 4479, 4481 (Mar. 20, 1986), stated: "This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."'" Quoting *Loving v. Virginia,* 388 U.S. 1, 11 (1967), which quoted *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943).

A. Strict Scrutiny Is the Appropriate Standard of Review for Race-Conscious Affirmative Action Plans

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This standard has been traditionally used when examining "suspect" classifications based on race or national origin. Such classifications are permissible only if they are necessary to promote a compelling interest of the government and only if there is a judicial finding that the use of the classification is so important as to outweigh the basic values of the Fourteenth Amendment.

The decision in *Korematsu v. United States of America,* 323 U.S. 214 (1944), was the start of equal protection constitutional analysis. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the Fourteenth Amendment absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to

> say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu,* 323 U.S. at 216.

This Court has not swayed from this standard of review when confronted with a classification based on race. In *Wygant* this Court stated "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant,* 54 U.S.L.W. at 4481, quoting *Regents of the University of California v. Bakke,* 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.).

In this case, the court below erred in applying a lesser standard of review to a race-based classification. It adopted the standard that "if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of remedying the present effects of the past discrimination" reverse racial classifications will be upheld. *Paradise,* 767 F.2d at 1531. The court should then "balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.*

Clearly, the one-black-for-one-white promotion quota here operates against nonminorities and in favor of blacks. It therefore constitutes a classification based on race and "'must necessarily receive a most searching examination to make sure that it does not conflict with constitutional

guarantees,' " *Wygant,* 54 U.S.L.W. at 4481, quoting *Fullilove v. Klutznick,* 448 U.S. at 491 (opinion of Burger, C.J.).

There are two prongs of the "strict scrutiny" test: "First, any racial classification 'must be justified by a compelling governmental interest.' " *Id.* at 4481, quoting *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984). "Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* at 4481, quoting *Fullilove,* 448 U.S. at 480.

For the promotion quota to be valid in this case, it must satisfy both prongs of the "strict scrutiny" test. This it cannot do.

II

WITHOUT EVIDENCE OF INTENTIONAL DISCRIMINATION THERE IS NO COMPELLING GOVERNMENTAL INTEREST TO JUSTIFY A RACE-CONSCIOUS PLAN

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the purpose of the promotion quota was to provide "an impetus to promote blacks" into the upper ranks. 767 F.2d at 1520. The District Court stated that quota relief was necessary and reasonable "because the history of this case made it clear that the 'intolerable' and 'egregious' *racial disparities* in the upper ranks of the Department would not be eradicated absent 'immediate, affirmative, race-conscious action.' " *Paradise,* 767 F.2d at 1524 (emphasis added).

Racial disparities alone are never sufficient to justify a racial classification. *Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984). As this Court stated in *Wygant,* "the Court has insisted upon some showing of

prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 54 U.S.L.W. at 4481.

Yet the lower court based its decision to order promotion quotas on the statistical disparity existing between the percentage of black and white state troopers in the upper ranks:

> "On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.*" *Paradise,* 767 F.2d at 1524 (emphasis in original).

These statistics offered by the court to justify this race-conscious promotion quota are of questionable validity since they explain only that there are no blacks in the upper ranks. They do not show discrimination.

No act of racial discrimination was alleged nor were there identified victims. While examples of individual discrimination are not always required, the lack of such proof reinforces the doubt arising from questions about the validity of the statistical evidence. The promotion quota ordered was clearly premised on the court's belief that the department was not doing enough to place blacks in the upper ranks. Discrimination in hiring, and the fact that its effect is felt at all levels, does not produce the necessary findings

of intentional discrimination in promotion. Absent a finding of past discrimination, the lower court cannot satisfy the first prong of the constitutional test that requires it to articulate a compelling governmental interest underlying the promotion quota. It is absolutely necessary that the lower court proffer something more than a showing of statistical disparity to prove past discrimination. It did not do so and therefore the race-conscious remedy adopted by the District Court is unconstitutional.

III

RACIAL PREFERENCE THAT SINGLES OUT NONMINORITY TROOPERS BURDENS INNOCENT PARTIES

The court's order, in its attempt to eliminate the effects of past discrimination in hiring by ordering promotion quotas without a showing of promotion discrimination, is itself discriminating on the basis of race. The absence of such evidence invalidates the promotion quota and therefore fails to justify the adverse impact on the interests of nonminorities. This Court has stated that burdens assigned to innocent third parties by such racial classifications are permissible only when "effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . ." *Fullilove,* 448 U.S. at 484.

Employees in any organization look forward to promotions to increase their status and wages. Employees in the state trooper force are no different. Being passed over for promotions may create adverse financial as well as psychological effects on these workers who have invested years in the job. Promotion quotas, like the layoffs in *Wygant,* "disrupt these settled expectations in a way that general hiring goals do not." *Wygant,* 54 U.S.L.W. at 4484.

The fatal flaw in too many affirmative action plans is the promotion of class privileges at the expense of individual rights. In this case the Court has declared that a person's race is more important than his or her individual actions or merits. This Court held in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

This Court has also declared: "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States of America*, 313 U.S. 80, 97 (1941).

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person who suffers it. It is of no consolation to that person to know that his or her race as a whole may or may not have been subject to deprivations at other times in other places. What the individual of any race demands and deserves is equal protection from discrimination. Otherwise, a person's race becomes more important than individual actions or merits.

IV

LESS BURDENSOME REMEDIES ARE AVAILABLE

A race-conscious remedy neither compensates victims nor punishes wrongdoers, but instead creates burdens and privileges based solely on skin color. It can only be justified

if it makes whole actual victims of discrimination. *Bakke*, 438 U.S. at 301; *Fullilove*, 448 U.S. at 482.[2] In *Fullilove*, one justice stated, "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Id.* at 530 n.12 (Stewart, J., dissenting).

Quotas do not redress the full effect of discrimination. The restoration of all identifiable victims of discrimination to their rightful places in the trooper rank will remedy to the fullest extent possible all of the effects of the employer's discrimination. There is nothing remedial about preferring an individual whose personal constitutional right to nondiscriminatory treatment has in no way been infringed solely because that individual is a member of the same racial group as others who were so victimized. And accordingly, giving such preferential treatment to persons who have no claim to a "rightful place" in the employer's work force necessarily deprives innocent third parties of their "rightful place." Therefore, promotion quotas serve neither a preventative nor compensatory function and such racially conscious remedies do not further any purpose of the Equal Protection Clause. If there are identifiable victims of promotion discrimination, then this Court should remand this case to the District Court to fashion a remedy to make these victims whole.

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2 It is interesting to note that this promotion quota is limited to blacks. It does not include Orientals, American Indians, or persons of Hispanic descent.

CONCLUSION

When the government distributes benefits under a race-conscious quota, it rejects the concern for the individual that forms the basis for a free society. Such quotas make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged by race discrimination; at the same time quotas in their arbitrariness exclude others who may have been subject to equally onerous burdens.

The replacement of individual rights and opportunities by a program based on race-conscious quotas is inconsistent with a society dedicated to equal opportunity. Amicus, Pacific Legal Foundation, therefore urges that the decision of the Eleventh Circuit be reversed.

DATED: August, 1986.

Respectfully submitted,

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Nos. 85-999 and 85-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Respondents.

PAUL E. JOHNSON,
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v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,
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On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Eleventh Circuits

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Consent to the filing of this Brief is excused by Rule 36.4 of the Rules of this Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police,

and a failure to correct the effects of this discrimination. For the past twelve years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.[1]

Detroit's affirmative action efforts have been focused on promotions. The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker, supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district

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[1] Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669/5670/5671 (D.C. Cir.). Also pending is a challenge to race-conscious promotions undertaken by the District to undo the consequences of past racial segregation and exclusion of blacks at the highest levels of the Department. *Dougherty v. Barry*, 607 F. Supp. 1271 (D.D.C. 1985), *appeals pending* (D.C. Cir. Nos. 85-5715/5716).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women applicants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. Also without admitting past discrimination, Los Angeles has unilaterally employed sex-conscious hiring measures to correct historical underrepresentation of women in the Fire Department and has otherwise pursued affirmative action in various municipal employment contexts.

The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If the use of these goals and timetables cannot lawfully occur, costly litigation will re-

open, a decade of growth in racial understanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. A major legislative objective was to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

Last Term, the United States pressed a *per se* challenge to race-conscious affirmative action in any aspect of employment whether public or private and whether imposed by a Court or voluntarily initiated. The United States' *per se* challenge was decisively rejected. The United States now presses another, albeit narrower, *per se* challenge to affirmative action. It contends that, *regardless* of the inefficacy of other measures, affirmative, race-conscious measures are impermissible *whenever such measures occur in the context of promotions.* It is often the case that the crippling effects of past discrimination are most severely felt in the supervisory ranks of municipal employers. Further, it is often the case that use of race-conscious measures is most necessary, and urgently so, in the context of promotions to such positions. Acceptance of the United States' position would strip the federal courts and also public employers of an essential tool for overcoming patterns of racial exclusion.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS, ESPECIALLY SUPERVISORY LEVELS, IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A. Crippling Effects of the Exclusion of Blacks From Positions of Responsible Supervision.

A *per se* rule that Title VII prohibits race-conscious remedial measures in the context of promotions would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. Such crippling effects are often most severely felt in the supervisory ranks of public safety agencies where, absent race-conscious measures, a paucity of minority representation may persist for many years after discrimination has ceased. An end to hiring discrimination and the undertaking even of vigorous minority *hiring* efforts will not by themselves begin to fulfill the urgent need for more minorities in higher ranks. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker, supra*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943 and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black com-

munity that the police lacked interest in investigating black-on-black crime—to a large extent, a function of the absence of blacks at supervisory and policy levels of the Department—resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

> [T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such . . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
>
> • • • •
>
> The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.
>
> • • • •
>
> Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record.'
>
> • • • •
>
> The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.
>
> This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's aliena-

> tion that at times there was active interference with officers performing their duty.
>
> • • • •
>
> The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices.

Id.

The persistence of police practices which poisoned relationships with the black community was attributable *less* to the underepresentation of blacks at the officer rank, substantial though it was, than to *the virtual absence of blacks in positions with the authority to curb such practices.* Until substantial numbers of black personnel appeared in supervisory and command positions, black residents of Detroit remained unpersuaded that the Department had stopped regarding them as "second class citizens" and black officers continued to feel they were regarded as "second class employees".

The willingness of Detroit to recognize and act on the destructive consequences of failure to correct the extreme underutilization of black officers, particularly at higher levels of the Department, came painfully. The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

B. Detroit's Race-Conscious Efforts Beginning in 1974.

Finally, in 1974, the City adopted a program of affirmative action employment measures. *Id.* at 963-64. The Department's need for more blacks at the entry-level rank of Officer was satisfied, without a race-conscious goal and implementing ratio, by: (1) eliminating practices with an adverse impact on black applicants for hire;

(2) introducing a rule requiring residency in Detroit as a condition for making application; and (3) minority-focused recruiting.[2] For promotions, different steps were needed. Candidates for promotion to sergeant and lieutenant came from the existing ranks of officers and sergeants which would for many years—regardless of the efficacy of minority hiring efforts—continue to reflect the effects of longstanding and persistent discrimination in hiring to, and promotion from, the entry rank of officer. Meanwhile, the Department faced an urgent need for more black personnel as sergeants and lieutenants. A program of race-conscious promotions was adopted by the City's Board of Police Commissioners consistent with the Detroit City Charter and after public hearings at which the Chief of Police and other concerned persons presented views both for and against such a program. *Baker*, *supra*, at 964.

Under the program adopted, the Department departs from making promotions in strict rank order from the eligibility lists, and promotes instead at an approximate

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[2] As of June 1974 when Detroit commenced those efforts, the Department was 17.2% black overall but only 5.15% of the sergeants and 4.78% of the lieutenants were black. *Id.* at 963. At that time, the population of Detroit was approximately 50% black. As a result of minority hiring efforts, the Department at the end of 1978 had attained black representation overall of 34.6% and at the officer rank, 39.1%.

In 1979 and 1980, a fiscal crisis necessitated layoffs of 1,100 officers. Through application of inverse seniority, the layoffs reduced black representation to 26% overall and 28% at the officer rank. *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194, 1197 (E.D. Mich. 1984), *appeals pending*, Nos. 84-1836, 85-1026, 85-1027, and 85-1041 (6th Cir.). The bulk of those officers remained on layoff until called back in 1984 and 1985 as a result of the District Court's July 25, 1984 Order, 591 F.Supp. at 1220-1221 as revised November 7, 1984, 36 FEP Cases 434, 439 (E.D. Mich. 1984). The recall of the laid off officers and extensive additional hiring made possible by improved economic conditions have brought black representation at the officer rank to the present level of 48%.

50-50 black-white ratio. Operation of the Detroit plan is not rigid but rather depends upon the availability of qualified black applicants and consistent review by the Chief of Police and the Board of Police Commissioners. In order to be eligible for promotion, black officers have had to demonstrate their qualifications by passing the regular promotional examination. After a thorough review of the evidence, the District Court in *Baker* found that black officers promoted under the affirmative action plan were "substantially equally qualified" as the white officers who were promoted in rank order. *Baker, supra,* at 970-79. The Sixth Circuit recognized that "*only well-qualified* blacks were promoted." *Bratton, supra,* 704 F.2d at 892 (Emphasis in original). Furthermore, in public meetings the Board of Police Commissioners has regularly reviewed the affirmative action promotions proposed by the Chief of Police, *Baker, supra,* at 924-27. Service ratings of Detroit's police sergeants and lieutenants indicate that those promoted pursuant to the plan have performed as well as those promoted in rank order.

In 1979, at the direction of the District Court to establish a "terminating period", *Baker, supra,* at 1003, the Board of Police Commissioners determined that the program of race-conscious promotions would continue until black representation at the sergeant and lieutenant ranks reached 50%. See *Baker v. City of Detroit,* 504 F.Supp. 841, 845-846 (E.D. Mich. 1980). Detroit has continued to apply the promotional ratio since 1974 in pursuit of the 50% end goal. Black representation has reached 32% at the rank of sergeant and 34% at the rank of lieutenant.

C. The Fruits of Detroit's Efforts.

Detroit's affirmative action efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of

Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.[3] *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population.

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

> The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.

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[3] Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:

> 'When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.'
>
> • • • •
>
> Two other examples were mentioned at trial. Inspector Mack Douglas commented upon the leadership of black lieutenants in handling crowds and demonstrators. He testified concerning an incident where a white officer had gotten into an altercation with a black woman whom he had stopped for a traffic offense. A hostile crowd of 40-50 blacks had gathered and a cry of 'officer in trouble' was put out over the radio. Then-lieutenant Douglas, who is black, rushed to the potentially-explosive scene. He was able to calm the crowd, assure them he would personally look into the incident, and persuade them to disperse.
>
> Chief Hart testified concerning a barricaded gunman situation. When dealing with this crisis situation, the police have to handle both the gunman and the crowds which inevitably develop. In the past, the crowds were often hostile to white officers. With a black lieutenant in control, the crowds were not a problem.

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

The importance of race-conscious promotions was highlighted especially during the period from 1980 through mid-1985 when large numbers of officers were laid off and black representation at the officer rank was sharply reduced. The District Court in *NAACP v. DPOA*, *supra*, described unrebutted testimony by Detroit's police officials that "community relations with the police force had dramatically improved since 1974" "as the result of the increase in black representation on the police force . . . ." 591 F.Supp. at 1206. The Court credited testimony that, notwithstanding the effect of the layoffs, there remained "a residue of good will in the community resulting from the increased black representation on the force." *Id.* While observing that this "good will" is "not inexhaustible", the District Court in *NAACP* credited its endurance over a period of several years in part to "*the presence of many black command officers, who were unaffected by the layoffs. . . .*" *Id.* (Emphasis added).

Use of race-conscious measures in promotions has been the centerpiece of Detroit's affirmative action efforts. Consistent with the concerns stated in *Weber* and in Justice Powell's opinion in *Wygant v. Jackson Board of Education*, —— U.S. ——, 106 S.Ct. 1842, 1851-1852 (1986), Detroit has refrained from use of race-conscious measures in layoffs.[4] In Detroit's experience, the increased presence of black personnel in positions of responsible supervision has proved to be of critical importance in carrying forward critical improvements in citizen cooperation during a several-year period when black representation at the officer level was severely reduced.

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[4] In the *NAACP* case, the district court determined that Detroit's failure to preserve the 1978 level of black representation through use of race-conscious measures was in violation of the Constitution. Detroits' appeal from that determination is pending in the Sixth Circuit.

D. The Experience of Other Cities.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

> is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 330.
>
> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the 'Wickersham Commission.' *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, supra at 167.

Detroit Police Officers Ass'n v. Young, 608 F.2d at 695.[5]

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's

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[5] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police departments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration (LEAA)[6] has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . ., the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).[7]

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[6] The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, Pub. L. No. 90-351, 82 Stat. 197; Pub. L. No. 91-644, 84 Stat. 1881; 42 U.S.C. § 3789d.

[7] The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color . . . ." 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies "mirror" Congress' objective. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

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not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or *to eliminate racial imbalance*." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 815(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-147, 93 Stat. 1167, 1206 (1979).

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the quality of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2) *Mexican Americans and the Administration of Justice in the Southwest* (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive

> purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), *reprinted in 1972 Leg. Hist.* at 419 (emphasis added).[8]

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

> The problem of employment discrimination is particularly acute *and has the most deleterious effect in these governmental activities which are most visible to the minority communities* (notably education, law enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.* H.R. Rep. No. 92-238, 92d Cong., 1st Sess 17 (1971), *1972 Leg. Hist.* at 77 (emphasis added).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." *1972 Leg. Hist.* at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter,

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[8] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, (Comm. Print 1972).

"If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." *Id.* (emphasis added).

In the course of Senate debate, Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. *1972 Leg. Hist.* at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

> [W]henever in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure.

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." *1972 Leg. Hist.* at 1120. *"Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time."* *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the debilitating effects of discrimination which influenced Congress to extend Title VII to cover state and local governments.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION AGAINST USE OF RACE-CONSCIOUS MEASURES IN CONNECTION WITH PROMOTIONS.

This Court's prior decisions involving affirmative action have produced a considerable degree of consensus. All of the Justices have determined that if there is a *sound basis for concluding* that a public employer has engaged in prior discrimination then the public employer may take race-conscious remedial affirmative action. The United States last Term contended that a governmental employer may not, in any circumstance, implement a race-conscious affirmative action plan which provides a benefit to an individual without first proving that the individual was a victim of racial discrimination. The Supreme Court unequivocally rejected that position. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concluded in *Wygant v. Jackson Board of Education*, *supra*, 106 S.Ct. at 1850, "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." Justice O'Connor summarized:

> The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, *supra*, 106 S.Ct. at 1853 (O'Connor, J.)

In the course of his *Wygant* plurality opinion, Justice Powell spoke in broad terms regarding use of race-

conscious measures, respectively, in hiring and in layoff. Justice Powell observed that "[i]n cases involving valid *hiring* goals" the burden on innocent individuals is largely "diffused among society generally" and that denial of hire is less "intrusive" than "loss of an existing job." 106 S.Ct. at 1851. Justice Powell proceeded to focus on the unique burden on innocent individuals arising from race-conscious layoffs:

> Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not.
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. *Id.* at 1851-1852.

Based on this discussion, the Petitioners present a simplistic contention for a *per se* rule against race-conscious measures for promotions: as in the case of layoffs, the burden of a race-conscious promotion is said to be borne by the particular individuals who are passed over for promotion rather than diffused among society generally. Brief of United States in *Paradise*, ——; Brief of Petitioners in *Johnson*, 32-42. This argument—lumping promotions together with layoffs in supposed joint contrast to hiring—is contrary to *Weber*. *Weber* itself involved, not a hiring program whose burden was diffused among society generally, but an in-plant training program. Selection to that program, which carried with it advancement to craft status, was a matter of *promotion*, not *initial hire*. The non-selection of Mr. Weber for that program defeated his own individual seniority expectation every bit as much as a race-conscious layoff would

defeat the individual seniority expectation of employees laid off thereby. Nevertheless, the Supreme Court contrasted the *race-conscious promotion* involved in *Weber* with a measure causing *loss of employment* by an innocent individual. It was on this basis that the Court in *Weber* held that the plan at issue there *did not trammel* the interests of nonminorities and accordingly *was not too intrusive*. Criitcal to the Court in *Weber* was the fact that the plan did not create an "absolute bar" to advancement of white employees inasmuch as half of those trained in the program would be white. Thus, in *Weber* itself, the Court's concern with excessive burden upon nonminority employees was focused upon (1) removal of white workers from the work force, and (2) absolute bars to advancement.

It is plain that race-conscious measures in promotions *do not* impose the same sorts of burdens as layoffs. They do not remove any individual from the work force. Nor would any properly-drawn promotional measure constitute an "absolute bar"—or even an undue bar—on the advancement of nonminorities.[9]

Promotions also present a far different case than layoffs from the standpoint of the existence of less intrusive means. Justice Powell observed

> Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Wygant, supra, 106 S.Ct. at 1852. In *Wygant*, the "valid purpose" was increasing the representation of minorities

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[9] Since the inception of race-conscious promotional measures in Detroit, several hundred white officers have been promoted to the ranks of sergeant and lieutenant. Detroit's program is hardly a bar on advancement by nonminorities.

as teachers in a particular school system; in Justice Powell's view, that purpose could be satisfactorily advanced through race-conscious hiring without provision for preferential layoffs. *Cf.* Opinion of Marshall, J. dissenting, 106 S.Ct. at 1865-1866. The notion of race-conscious hiring as a "less intrusive means" would obviously have had no application in a setting such as *Weber* or in other cases where increasing minority representation in positions beyond the entry level is itself the "valid purpose". In *Weber*, the Court recognized the exclusion of minorities from craft employment. *Weber, supra*, 443 U.S. at 198, n.1. Given the unavailability of minority skilled craftsmen in the exterior labor market, merely setting a goal for *hiring* minority craftsmen would obviously have been ineffectual as a means for increasing minority representation in Kaiser's craft workforce.

Use of a race-conscious promotional measure by Kaiser and the United Steelworkers *was the least intrusive means* just as it was in Detroit. A hiring goal would have failed, for many years to come, to satisfy Detroit's urgent need for more blacks in positions of responsible supervision. As stated by the Sixth Circuit

> [T]he use of racial classifications reflects the only legitimate method for achieving [the] objectives [of the plan] in light of the urgent need for a remedy and the practical limitations placed on the effective use of other means . . . .

Bratton v. City of Detroit, 704 F.2d at 892. See also *Baker, supra*, 483 F. Supp. at 994 ("the affirmative action program was necessary to ensure the rapid eradication of past discriminatory effects . . . *nothing less than race-conscious promotions could do this.*") (emphasis added).

CONCLUSION

This Court should decisively reject the contention that race-conscious measures are prohibited when they involve promotions either by the Constitution or by Title VII.

Respectfully submitted,

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No. 85-999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTION PRESENTED

Whether the Fourteenth and Fifth Amendments prohibit the use of a one for one promotion ratio to remedy the discriminatory effects of and prevent future discriminatory actions by a governmental employer.

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BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race conscious numerical remedies are for a variety of pragmatic reasons a practical necessity. In some instances, numerical remedies are essential to ending ongoing intentional discrimination. In other circumstances, such remedies are a practical necessity in

resolving by settlement, disputes as to the identities of direct or indirect victims of discrimination. We believe that effective enforcement of Title VII would at times be impossible unless numerical orders remain among the arsenal of remedial devices available to the federal courts. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case raises important questions regarding the power and resolve of the Federal courts to eliminate the last vestiges of discrimination in our society. In Albemarle Paper Co., v. Moody, 422 U.S. 405, 418 (1975), this Court held that the

critical objective of Title VII is "to eliminate so far as possible, the last vestiges" of discrimination.[1] The Solicitor General, however, would impose a parsimonious interpretation on that mandate, and exclude from its reach one of the harsh results of such discrimination: the virtual exclusion of blacks from all but entry level positions with the Alabama Highway Patrol.

In answering the constitutional

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[1] A number of the cases described herein involve Title VII as well as constitutional claims. In a Title VII case the practical remedial problems are similar to those in a Fourteenth Amendment case. See, Louisiana v. United States, 380 U.S. 145. 154 (1965):

> ...the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

question addressed by the parties to this action, the Court must necessarily consider the power of the federal court to order comprehensive race conscious relief, particularly where, as here, the defendant has made extraordinary efforts to defeat prior orders from the court. That inquiry is emblazoned by the position of the Alabama Highway Patrol as a veritable icon of racial bigotry and oppression of blacks throughout the south.

Few defendants come to this court with so rich a history of discrimination, or so clear a mantle of discriminatory oppression, as does the Alabama Highway Patrol. The actions of this defendant in excluding blacks from their ranks; evading court orders and consent ecrees requiring the integration of their workforce; and

its participation in some of the most infamous abuses of the rights of black people during the struggle for civil rights, exemplifies the reasons race conscious promotional relief is a necessary and appropriate tool in eliminating the effects of entrenched racial discrimination.

In 1972 Chief District Judge Frank M. Johnson found that the Alabama Department of Public Safety (the parent agency of the Alabama Highway Patrol) "engaged in a blatant and continuous pattern and practice of discrimination" against blacks, and noted that "[I]n the thirty-seven year history of the patrol there has never been a black trooper". NAACP v. Allen, 340 F.Supp. 703, 705 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir.

1974). In order to eliminate the effects of that record of discrimination, the court ordered that 50% of the entry level troopers hired by the department be black until 25% of the trooper force was black.

Notwithstanding this clear mandate, the Department continuously tried to frustrate the order. In 1975 the district court found that the defendant, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of troopers hired.[2] In 1979 the district court found that the effects of the defendant's discrimination pervaded all levels of the Department, and noted that the hiring

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[2] See Order of August 5, 1975, Joint Appendix 34.

relief ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry-level trooper. Paradise v. Prescott, 767 F.2d 1514 (1985), quoting Paradise v. Shoemaker, 470 F.Supp. 439, 442 (M.D. Ala. 1979).

By December 1983, nearly 12 years after the 1972 order, only 4 of 197 persons above entry level were black, and none of them were above the rank of corporal. Paradise v. Prescott, 585 F.Supp. 72, 74 (M.D. Ala. 1983), aff'd, 767 F.2d 1514 (11th Cir. 1985), cert. granted, 106 S.Ct. 3331 (1986).

This specific record of intentional and continuous frustration of the employment opportunities of blacks is best evaluated when overlaid with the societal

discrimination prevalent in Alabama, and the role played by the Alabama Highway Patrol as the protector of the status quo. The efforts of the Department to exclude blacks from its ranks and then to prevent their advancement within those ranks is in keeping with the role of the department as a bastion of the Jim Crow era. Particularly vivid in the minds of blacks through out this nation are images of Alabama State Troopers driving black civil rights demonstrators from the Courthouse lawn in Gadsden, Alabama using cattle prods and nightsticks.[3]

This Court cannot afford to ignore this history, and the special position of public safety agencies, in determining

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[3] United States Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South (1965) p. 63.

whether the one for one promotion ratio is permissible under the Equal Protection clause. While this Court remains divided on the question of whether strict scrutiny or an intermediate standard applies when evaluating an affirmative action plan, on the facts of this case the government plainly has both an important and compelling interest in rectifying this situation. These concerns are no less important in determining the scope of the remedy which, though narrowly defined, must be designed to completely eradicate the effects of this history of discrimination.

Both Courts below conscientiously applied these standards and held that, in the light of the history of this case, the district court's enforcement of the

consent decree was "eminently reasonable" and moreover that "without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated". Paradise v. Prescott, 767 F.2d 1514, 1533 (1985).

The 1983 order imposing one for one promotion is reasonably designed to insure that the last vestiges of the long and brutal history of discrimination by the Department are eradicated. Moreover, in fashioning a remedy that is both flexible and temporary, the court below avoided imposing unnecessary burdens on the white troopers, while insuring that blacks would no longer be unfairly denied opportunities which had been withheld for almost half a century. Plainly the court below

considered the availability and efficacy of other remedies, Fullilove v. Klutznick, 448 U.S. 448 (1980). However such avenues of redress were ineffective because the Department actively sought to frustrate compliance with the court's order. Notwithstanding that history the court did not permanently impose a one for one promotion ratio; rather, once a nondiscriminatory promotion system was developed, the one for one ratio ceased to apply.

The efforts undertaken by the experienced Federal judges who considered this case are necessary tools in the elimination of the lingering effects of the history, and, as here, current discrimination suffered by blacks in this country. If the methods used here, under

circumstances as egregious and significant as here portrayed are ruled unconstitutional, than there will be little means available to seriously address the mandate of Albemarle, and Louisiana v. U.S., 380 U.S. 145, 154 (1965).

ARGUMENT

I. REMEDYING RACIAL DISCRIMINATION BY A STATE ACTOR IS A SUFFICIENT STATE INTEREST TO WARRANT REMEDIAL USE OF RACE CONSCIOUS REMEDIES.

While the members of this Court "have not yet agreed ... on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures", Local 28, Sheet Metal Workers' International Association v.

EEOC, 106 S.Ct. 3019, 3052 (1986) (Opinion of Brennan, J.),[4] two principles are certain. One, that "..whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program", Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1853 (Opinion of O'Connor, J., slip p.3); and, two, that race-conscious remedies designed to eliminate the vestiges of discrimination can be used consistent with the Equal

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[4] See, Regents of the University of California v. Bakke, 438 U.S. 265, (four justices favoring strict scrutiny and four favoring intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448 (1980) (three justices favoring strict scrutiny three favoring intermediate scrutiny and three declining to decide the issue.

Protection guarantees of the Fifth and Fourteenth Amendments. Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1848 (1986) (Opinion of Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); id. at 1853 (Opinion of O'Connor, J.); id. at 1861 (Opinion of Marshall, J., joined by Brennan and Blackmun, J.J.); id. 1867-1868 (Opinion of Stevens, J.); Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978) (Opinion of Powell , J.); id. at 325 (Opinion of Brennan, J., joined by White, Marshall and Blackmum, J.J); Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. 3019, 3052 (1986) (Opinion of Brennan, J., joined by Marshall, Blackmun and Stevens, J.J.); id. at 3054-55 (Opinion of Powell, J.).

This Court has likewise made plain that race-conscious affirmative relief need not be limited to victims of prior discrimination, Wygant v. Jackson Board of Education, 106 S. Ct. at 1853 (Opinion of O'Connor, J.); id. at 1863 (Opinion of Marshall, J.); id. at 1867-68 (Opinion of Stevens, J.); cf. id. at 1850 (Opinion of Powell, J.); see also Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. at 3052-53 (Opinion of Brennan, J.); id. at 3054-57 (Opinion of Powell, J.); and that "innocent persons may be called upon to bear some of the burden of the remedy" Wygant v. Jackson Board of Education, 106 S. Ct. at 1850 (Opinion of Powell, J.).

II. THE ROLE OF THE ALABAMA HIGHWAY PATROL IN THE OPPRESSION OF BLACK PEOPLE IS IMPORTANT IN DETERMINING THE SCOPE OF THE REMEDY WHICH, THOUGH NARROWLY TAILORED, ACCOMPLISHES ITS PURPOSE

There can be no doubt, as the Solicitor General concedes, that government has a "compelling interest" in remedying racial discrimination practiced by a public employer. (Brief For The United States at 21). Equally important however, is the fashioning of a remedy to eradicate the effects of that discrimination. In determining the scope of that remedy it is important to assess the scope of the effects of the discrimination that is to be remedied. Here, the history of the Alabama Highway

Patrol, as an instrument of oppression of black people, is critical to that assessment.

The current effects of that history and the fact that their are still no blacks above the rank of corporal, demonstrates that the effects of that awful history continue to linger. The effects linger in the form of an all-white supervisory force; they linger in the form of intransigence by that supervisory force to the promotion of qualified blacks; and they linger in the form of social and official discrimination which led to an unusually high attrition rate for blacks who were hired.[5]

The refusal of the department to

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[5] Order of August 5, 1975, Joint Appendix 34.

incorporate blacks into any but the lowest level of the department, reenforce attitudes formed by the pernicious behavior of the Alabama Highway Patrol during the struggle for Civil Rights in the South.

In Williams v. Wallace, 240 F.Supp. 100 (M.D. Ala. 1965), the District Court, Johnson, J., issued an injunction enjoining the Governor of the State of Alabama, George C. Wallace, the Director of Public Safety for the State of Alabama, Albert J. Lingo, and others, "from intimidating, threatening, coercing or interfering with the proposed march" from Selma, Alabama, to Montgomery, Alabama, in March of 1965. 240 F.Supp. at 109.

The court's order was precipitated by the continuous brutal conduct of the all-

white Alabama State Troopers, and their constant efforts to harass, intimidate, coerce, threaten and brutalize blacks engaged in demonstrations for the purpose of encouraging blacks in their attempt to register to vote, and to protest discriminatory voter registration practices in Alabama.

For example, the district court made the following findings with respect to the State Troopers' efforts to disrupt the voter registration demonstrations in Perry County, Alabama:

> [O]n February 18, 1965, when approximately 300 Negroes were engaged in a peaceful demonstration by marching from a Negro church to the Perry County Courthouse for the purpose of publicly protesting racially discriminatory voter registration practices in Perry County, Alabama, the Negro demonstrators were stopped by the State troopers under the command of

> the defendant Lingo, and the Negro demonstrators were at that time pushed, prodded, struck, beaten and knocked down. This action resulted in the injury of several Negroes, one of whom was shot by an Alabama State Trooper and subsequently died.

Williams v. Wallace, 240 F.Supp. at 104.

These efforts of the Alabama State Troopers and others came to a dramatic climax on Sunday, March 7, 1965. Approximately 650 black demonstrators left the church in Selma, Alabama, for the purpose of walking to Montgomery, Alabama. There the demonstrators planned to present to the Governor their grievances concerning the discriminatory voter registration practices in several central Alabama counties, and, the restrictions that had been imposed on their public demonstration in opposition to these practices.

As the demonstrators proceeded to the Edmund Pettus bridge near the south edge of the City of Selma, they were "confronted by a detachment of 60 to 70 State troopers headed by the defendant Colonel Lingo". Id. at 105. As detailed by the District Court, the troopers then proceed to implement their plan to disperse the demonstrators, using tactics "similar to those recommended for use by the United States Army to quell armed rioters in occupied countries." Id. at 105.

> The troopers, equipped with tear gas, nausea gas and canisters of smoke, as well as billy clubs, advanced on the Negroes. Approximately 20 canisters of tear gas, nausea gas, and canisters of smoke were rolled into the Negroes by these State officers. The Negroes were then prodded, struck, beaten and knocked down by members of the Alabama State Troopers. The

> mounted "possemen," supposedly acting as an auxiliary law enforcement unit of the Dallas County sheriff's office, then, on their horses, moved in and chased and beat the fleeing Negroes. Approximately 75 to 80 of the Negroes were injured, with a large number being hospitalized.

Williams v. Wallace, 240 F.Supp. at 105.

These events not only obliged the court to grant the injunction restraining the brutal activities of the Alabama State Troopers, but also played a significant role in the subsequent passage of the Voting Rights Act of 1965.

The activities of the Alabama Highway Patrol were not however limited to disrupting the efforts of blacks to obtain access to the ballot box. Indeed Alabama State Troopers have been commonly used to enforce the racial status quo. In 1965 the United States Commission on Civil

Rights documented several incidents in which local government agencies used violence and suppression to preserve the subservient position of blacks, by suppressing the attempts of local blacks to assert their constitutional rights. In each of the events cited by the Commission, local law enforcement agencies either refused to protect black demonstrators from violence, see, United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961), or were in fact the perpetrators of violence against the demonstrators.

The report makes specific mention of the Alabama State Troopers during a demonstration in Gadsden, Alabama, on June 1, 1963.

> A few days after the first sit-in, city officials obtained

> a State Court injunction that prohibited demonstrators from blocking sidewalks, entrances to stores, and traffic, but expressly permitted certain types of peaceful demonstrations. The next afternoon . . . 235 persons were arrested for violating the injunction. That evening a large group of Negroes assembled on the courthouse lawn to protest the arrests; they were driven from the lawn by Alabama State troopers using cattle prods and nightsticks.

U.S. Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South (1965), p.63.

Such actions by the Alabama Highway Patrol put them in the forefront of the brutal struggle to maintain the rigid pattern of racial segregation that existed in Alabama. Indeed when Governor George C. Wallace made his infamous "stand in the schoolhouse door" in defiance of a Federal Court Order to desegregate the University

of Alabama, he was "flanked by state troopers".[6] The backbone of this rigid policy of segregation was a series of laws requiring segregation, which the apparatus of the state was fully prepared to enforce.[7]

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[6] See New York Times, Wednesday, June 12, 1963, page 1.

[7] See, e.g., United States of America v. The State of Alabama, Civil Action Number 83-C-1676-S, p.2. (Northern District of Alabama, Southern Division, December 7, 1985), wherein the court makes exhaustive findings regarding segregation in higher education in Alabama, and concludes that:

> ... the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the "root and branches" of the dual system have not been eliminated.

Gunnar Myrdal, in his classic work An American Dilemma, uses Alabama as an example of the particularly egregious operation, administration and enforcement of discriminatory practices or laws. Noting that of all the black policemen, detectives, marshals, sheriffs,

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As one district court observed, the "march of history" in Alabama was an "extensive and extended history of exclusion of blacks from the Alabama political and governmental system," which included discriminatory exclusion from jury service and from voting employment and educational opportunities. Whitehead v. Oliver, 339 F. Supp. 348, 355-57 (M.D. Ala. 1975) (Three-Judge Court).

See also, Gunnar Myrdal, American Dilemma, 543, 635-36, 638-39, 952-53 (Pantheon Paperback 1964); N. Bartley, The Rise of Massive Resistance 87-88, 200-201 (Louisiana State University Press 1969); Hawley, "Negro Employment in the Birmingham Metropolitan Area", in Selected Studies of Negro Employment in the South 265 (National Planning Association ed. 1951); Birmingham Area Chamber of Commerce, Century Plus 23 (1976); "Law Enforcement", Birmingham 19-20 (Nov. 1969).

constables, probation and truant officers in 1930, only 7% were employed in the South, Myrdal observes:

> The geographic distribution of Negro policemen is in inverse relation to the percentage of Negroes in the total population. Mississippi, South Carolina, Louisiana, Georgia and Alabama--the only states with more than 1/3 Negro population --have not one Negro policeman in them, though they have nearly 2/5 of the total Negro populations of the nation.

2 G. Myrdal, An American Dilemma 635-36 (Pantheon Paperback 1964).

The discriminatory employment practices of the Alabama Highway Patrol, combined with its specific history of brutality, served to reinforce a reputation in the black community which fostered mistrust and apprehension. In circumstances such as these the courts have often found that mandatory injunctive

relief is necessary to restore faith in these institutions. In Morrow v. Crisler, 491 F.2d 1053, 1055 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974), following intransigence on the part of the Mississippi Highway Patrol similar to that encountered by the court here, the Fifth Circuit noted that some form of mandatory injunctive relief would be essential if the Patrol was to obtain the confidence of the black community:

> The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices. . . . Since we are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . .

> additional . . . measures [must] be taken. . . .

The experience of this Court and the lower courts has repeatedly demonstrated that as a practical matter there are secondary and indirect effects of racial discrimination which may often cause severe and enduring injuries. Rogers v. Paul, 382 U.S. 98, 200 (1965) (effect on students of faculty segregation); Gladestone Realtors v. Bellwood, 441 U.S. 91 (1979) (effect on whites of housing discrimination against blacks). That the lower courts were aware of these effects is indicated by the following language from the Fifth Circuit's opinion in NAACP v. Allen, 493 F.2d at 621, which, while it is directed at a hiring ratio, is no less applicable to the promotion ratio currently under consideration.

> The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.

The Department's discriminatory policies permeated the entire agency, affecting both its employment policy and its treatment of black citizens. The profound impact of the Department's policies and history is not likely to be remedied by the simple inclusion of a few blacks at the lowest levels of employment with the agency. Indeed, failing to address the problem of promotion would be similar to

integrating a school system by having black students but no black teachers; or black teachers but no black principals. See e.g., Rogers v. Paul, 382 U.S. at 200.

The one for one promotion ratio ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry level trooper Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979). In order to obtain real change and to give the community a sense of that change, the district court recognized the necessity of insuring that blacks became part of the entire structure of the department. Such action is necessary to prevent discrimination against subordinate minority employees and the public.

III. THE REMEDY FASHIONED BY THE DISTRICT COURT TOOK APPROPRIATE CONSIDERATION OF CRITICALLY IMPORTANT PUBLIC SAFETY CONCERNS

The special function of government and the responsibility of those empowered to enforce the law makes particularly compelling this Court's suggestion that promoting racial diversity in the workforce is a sufficiently compelling government interest to support implementation of an affirmative action plan. See Wygant v. Jackson Board of Education, 106 S.Ct. at 1863 (Opinion of Marshall, J., joined by Brennan and Blackmun, J.J.); id. at 1868 (Opinion of Stevens, J.). See also id. at 106 S.Ct. at 1853 (Opinion of O'Connor, J.).

Moreover it is precisely the evil of racial exclusion and other discriminatory

practices on the part of governmental employers that Congress sought to address when it made Title VII applicable to state and local governmental employers. Similarly in support of her contention that "the remediation of governmental discrimination is of unique importance",[8] Justice O'Connor specifically cited the legislative history of the 1972 Amendment to Title VII.

> Th[e] failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. . . . Discrimination

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[8] Wygant v. Jackson Board of Education, 106 S.Ct. at 1855.

> by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S. Rep. No. 92-415 at 10 (92nd Cong., 1st Sess. 1971)[9]

More specifically, both the Congress and the United States Commission on Civil Rights recognized the particular importance of removing racial barriers to employment with police agencies.

> . . . Barriers to equal employment are greater in police and fire departments than in any other area of State and local government.. . . State police forces employ very few Negro

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[9] Reprinted in Legislative History of the Equal Employment Opportunity Act of 1972 (1972) at 419.

> policemen. . . . Police and fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers.. . . Unless special precautions are taken, a past history of overt discrimination may continue to deter minority applications for employment or advancement, particularly with respect to positions which have not traditionally been held by minority persons.

United States Commission on Civil Rights, For all the People . . . By All the People--A Report on Equal Opportunity in State and Local Government Employment (1969), reprinted as exhibit Legislative History of the Equal Employment Opportunity Act of 1972 (92nd Cong. 1972) p.1118-1119.

Almost twenty years ago the Report of

the National Advisory Commission on Civil Disorders (Bantam Books ed., 1968), pointedly noted circumstances which surely apply to the Alabama Highway Patrol.

> [F]or police in a Negro community to be predominantly white can serve as a dangerous irritant; a feeling may develop that the community is not being policed to maintain civil peace but to maintain the status quo.

Id. at 315.

The United States Civil Rights Commission in its publication, Who is Guarding the Guardians?: A Report on Police Practices (1981), made a similar observation while quoting a report of the National Minority Advisory Council on Criminal Justice, October 1980.[10] The

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[10] The National Minority Advisory Council on Criminal Justice was established in June 1976 by the Law Enforcement Assistance Administration of the U.S. Department of Justice.

Advisory Council's report noted that the nation's first police force was developed in the South to prevent disruptions by slaves, and that typically the police share the society's views of minorities and those views are reflected in the police agencies dealings with minorities.

These and similar observations have led to the conclusion, noted by Justice Stevens, that it might reasonably be concluded that a racially diverse police force "could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers", Wygant v. Jackson Board of Education, 106 S.Ct. at 1868, a view similarly expressed by the First, Second, Fourth, Fifth, Sixth, Seventh and Eighth

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Circuits.[11] These opinions share an awareness of the deleterious effect on the community of maintenance of segregated employment patterns in law enforcement agencies, which is not limited to lower level positions.

> This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:
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> If minority groups are

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[11] See Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982); Bridgeport Guard, Inc. v. Bridgeport Civil Serv. Com., 482 F.2d 1333, 1340-41 (2d Cir. 1973); Talbert v. City of Richmond, 648 F.2d 925, 931-32 (4th Cir. 1981), cert. denied, 454 U.S. 145 (1982); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Detroit Police Officers Ass'n. v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979); United States v. City of Chicago, 663 F. 2d 1354, 1364 (7th Cir. 1981) (en banc); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972). See also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 167 (1969).

> to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions.

Detroit Police Officers' Ass'n. v. Young, 608 F.2d 671, 995 (6th Cir. 1979) (quoting President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 167). See also, Talbert v. City of Richmond, 648 F.2d 925, 932 (4th Cir. 1981).

As graphically reported by the Sixth Circuit, the effects of black senior officers can markedly change the tenor and outcome of interactions between the police and minority citizens.

> The record established a pattern of mistreatment in the form of outright discrimination by white officers against black citizens

> as well as more subtle discrimination in the handling of complaints and investigations. A number of witnesses testified to the fact that many such incidents could have been avoided had black lieutenants been overseeing the interaction of police officers and black citizens.[12]

Given the brutal history of the Alabama Highway Patrol and its active role in the suppression of blacks, the view taken by the Sixth Circuit in Bratton v. City of Detroit, 704 F.2d 878, 897 n.44 is particularly pertinent:

> We have chosen to deal with the situation with regard to the Detroit citizenry as an element of our redress analysis. This is so because in Detroit the issue cannot be neatly categorized within the bounds of "operational needs." We are faced with far more than a generalized need for a police force which reflects the racial

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[12] Bratton v. City of Detroit, 704 F.2d 878,895-96 (6th Cir. 1983).

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> composition of the city. We are faced, rather, with a population that has been subjected to constitutional indignities as a direct result of the discriminatory practices which have created and maintained a white-dominated police force. Whatever the appropriate semantics in such a situation, we are convinced that the facts present a constitutionally valid justification (a substantial governmental interest) for the implementation of this particular remedy.

Certainly no less than the police in the City of Detroit, Alabama State troopers subjected black people to a myriad of constitutional indignities. Indeed the symbolic nature of many of those abuses, such as the actions of the Alabama State Troopers during the March from Selma to Montgomery, are indelible symbols of racial intolerance. As the record in this case indicates, those actions were combined with a deliberate

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policy of excluding blacks from their ranks, and once the most heinous of those abuses were no longer in the public eye, the Alabama Highway Patrol continued to obstruct the integration of its ranks.

The brutal practices of the Alabama Highway Patrol and their discriminatory employment history, as documented in the proceedings below, make plain that the state has an important and compelling interest in fully rectifying this situation.

Here, societal discrimination crystallized in an organization that symbolized the oppression of black people. The refusal of state authorities to integrate the organization was an indication of the reluctance of the State to yield this last bastion of white

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supremacy to the demands of simple justice. This stance and the very nature of the State Troopers demanded comprehensive action on the part of the court, lest it neglect its "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". Louisiana v. United States, 380 U.S. 145, 154 (1965). Thus the operational need was both practical (an investigative and law enforcement agency needs the support of the people it protects, and must be seen as fair and even handed) and symbolic (ending the history of the Alabama Highway Patrol as an all-white tormentor of the black community). The one for one promotion remedy appropriately reflects

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the need to eradicate the effects of centuries of exclusion of black people from the power or ability to obtain personal security in Alabama.

IV. THE ONE FOR ONE PROMOTION RATIO INTRODUCED BELOW, WAS NARROWLY TAILORED TO ERADICATE THE DISABLING EFFECTS OF THE DEPARTMENT'S PAST DISCRIMINATION, AND TO PREVENT FUTURE DISCRIMINATION

In Regents of the University of California v. Bakke, 438 U.S. at 307, Justice Powell asserted that the states have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." However the formulation of the Solicitor General would define those effects so narrowly as to leave many of the most pernicious results

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of the Alabama Highway Patrol's actions untouched. Similarly by restricting the available remedies to dismantling specific procedures used to discriminate, the government essentially resurrects the arguments rejected by this Court last term.

The state's interest in eradicating the effects of past discrimination encompasses not only the dismantling of the apparatus of discrimination, but also securing measures that will prevent future discrimination. Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. at 3049.

In the case of this defendant it is clear that the lower courts were confronted with a situation in which the entire structure of the Department was

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permeated with intentional and persistent discrimination. Beginning with NAACP v. Allen, 340 F.Supp. 703, 705-6 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974), the district court found unequivocally that the Department "engaged in a blatant and continuous pattern and practice of discrimination in hiring", and that:

> The racial discrimination in this instance has so permeated the Department of Public Safety's employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

In 1975 the Court of Appeals observed:

> As in Morrow, [v. Crisler, 491 F.2d 1053 (5th Cir. 1974)], the district court was confronted with (1) clear evidence of a

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> long history of intentional racial discrimination, (2) a paucity, if not a total absence of any positive efforts by the patrol to recruit minority personnel and (3) utilization of unvalidated employment criteria and selection procedures and other discriminatory practices.

NAACP v. Allen, 493 F.2d 614, 620-1 (5th Cir. 1974).

Based on this record the Fifth Circuit upheld the district court's conclusion that numerical relief was essential toward making any "meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization". Id.

Even after the Court of Appeals upheld the original hiring Order in this case, the district court found the Defendants, for the purpose of

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"frustrating or delaying full relief to the plaintiff class", to have "artificially restricted the size of the trooper force and the number of troopers hired". Order of August 5, 1975 J.A. 34[13].

Moreover the district court made the following findings with respect to the unusually high attrition rate for blacks hired since 1977:

> [T]he high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force.

---

[13] Citations to "J.A." are to the Joint Appendix.

Id.

Shortly before the imposition of the challenged order, the district court rejected the promotion proposal of the Patrol, finding that it failed to comply with the requirements of the 1981 consent decree that it be free of adverse impact. After applying the Uniform Guidelines of Selection Procedures, and noting that zero blacks would be promoted under the Patrol's plan, the court held:

> Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact.

Paradise v. Prescott, 580 F. Supp. 171, 173 (M.D. Ala. 1983).

This pattern of resistance on the part of the Department continued. Less than three years ago the district court

found:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, there is still not one black. Of the 25 captains, there is still not one black. Of the 35 lieutenants, there is still not one black. Of the 65 sergeants, there is still not one black. And of the 66 corporals, only four are black. Thus, the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to

> take substantial steps to open the upper ranks to black troopers. (emphasis in original)

Paradise v. Prescott, 585 F.Supp. 72, 74 (M.D. Ala. 1983).

Another clear example of the court's concern with the Patrol's intention to carry out the decree in good faith was its response to the Department's contention that it "is without legal authority and sufficiently trained personnel to design any promotional procedures", pursuant to its Consent Decree obligation to provide for the advancement of black troopers into the upper ranks of the Patrol. Order of January 13, 1984 J.A. 138.

> The Public Safety Department's contention that it is without legal authority is not only meritless, it is frivolous.
>
> Moreover, that the Department of Public Safety would even advance

> this argument dramatically demonstrates the need for the relief imposed by this court. Such frivolous arguments serve no purpose other than to prolong the discriminatory effects of the department's 37-year history of racial discrimination.

Id. at 139.

Confronted with actions such as these the lower courts have frequently determined that positive action in the form of mandatory injunctive relief is necessary to overcome the effects of past discrimination and to prevent future discrimination. In a variety of circumstances where district courts have concluded that an employer would not obey a general injunction against employment discrimination, numerical hiring or promotion orders have been required simply to end continued intentional violations of

the law.[14] Race conscious orders regarding the selection of supervisory personnel[15] or public employees[16] have been utilized where district courts regarded them as necessary to prevent discrimination against subordinate workers or against the public. Where an employer has been found guilty of using a non-job related employment test, and no new test

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[14] See, e.g. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

[15] See, e.g. McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (3 of 5 members of selection panel to be black); cf. Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (quota hiring necessary to end racist environment of virtually all white workforce).

[16] See, e.g., Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983) (police); NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982) (police and fire); Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976)(teachers).

has yet been framed, courts have directed that, as an interim measure, the old test may be utilized in combination with a race-conscious adjustment to eliminate the discriminatory effect of that test.[17] Even in providing relief for victims of past discrimination, judges have at times found it impracticable to frame decrees affecting thousands of potential victims of classwide discrimination with the same precision that might be possible in a single tort action.[18]

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[17] See, e.g., Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (interim numerical hiring order necessary as "compliance relief"); Kirkland v. New York Dept. of Corrections, 628 F.2d 796 (2d Cir. 1980) (Interim order adding 250 points to scores of minority applications on non-job related test).

[18] Segar v. Smith, 738 F.2d 1249, 1289 n. 36 (D.C. Cir. 1984) (individualized hearings not required where impracticable); Association Against

Several circuits have concluded that in some situations the unlawful deterrent effect of an employer's well deserved reputation for discrimination could only be dissipated by a court ordered increase in the number of minority or female employees.[19]

Similarly, when lower courts have concluded that eradication of continuing discrimination required an alteration of the group of individuals involved in making critical personnel decisions, they have issued orders directing that

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Discrimination v. City of Bridgeport, 20 FEP Cases 985 (D.Conn. 1979) (where number but not identities of victim known, beneficiaries of decree to be chosen by lot among probable victims).

19 Association Against Discrimination v. City of Bridgeport, 594 F.2d 306, 311 n.13 (2nd Cir. 1979); Carter v. Gallagher, 452 F.2d 315, (8th Cir. 1971).

specified numbers of minorities or females be included among officials responsible for recruiting new applicants,[20] considering appeals of rejected applicants,[21] training newly hired workers,[22] and, more broadly, evaluating all hiring and promotions.[23] Such orders were upheld as "an effective method to prevent future discrimination".[24]

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20 Commonwealth of Pennsylvania v. Rizzo, 13 FEP Cases 1475, 1483 (E.D. Pa. 1975).

21 Id.

22 Williams v. City of New Orleans, 543 F.Supp. 662, 682 (E.D. La. 1982), aff'd 729 F.2d 1554 (5th Cir. 1984) (en banc); United States v. Operating Engineers, 4 FEP Cases 1088, 1097 (N.D. Cal. 1972).

23 Ostapowicz v. Johnson Bronze Co., 12 FEP Cases 1230, 1232 (W.D. Pa. 1974).

24 Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 404 (3rd 1976).

Absent the requirement that the Department be forced to include blacks among the upper ranks of the Patrol -- as envisioned by the original hiring order and subsequent consent decree -- the likelihood of substantial change in the Department was virtually nil. In effect, the situation was not unlike that confronted by the court in Taylor v. Jones, 495 F.Supp. 1285 (E.D. Ark. 1980), aff'd, 653 F.2d 1193 (8th Cir. 1981), where a black plaintiff had been driven from her position as one of the Arkansas National Guard's few minority workers after a long period of harassment. The trial court held that full relief required more than an order reinstating Taylor in the job involving the same "appalling conditions." 495 F.Supp. at 1294. The

judge found that, at the offices of the Guard,

> as the environment approaches a fairer racial representation, the degree of racism tends to diminish. . . . [Plaintiff] has standing not only to seek reinstatement, but to seek reinstatement in a work place where all people are treated with decency and respect. The Court finds that this goal will be materially impeded unless the Arkansas National Guard is required to step up its employment of qualified black persons. . . . There simply is no other way to ensure that the law will be complied with in the future.

495 F.Supp. at 1294.[25]

The lower courts' choice of a one for one ratio was clearly based on its experience with the Department over a 12 year period: a period during which the defendant clearly demonstrated its

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25 See also, Sosna v. Iowa, 419 U.S. 393, 414 n.1 (1975) (White, J., dissenting).

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willingness to exhibit exceptional intransigence. The one for one promotion ratio ordered by the court addresses this intransigence as well as the government's broad interest in eradicating the lingering effects of discrimination and preventing the continuation of that discrimination into the future.

After almost half a century of existence and 12 years of litigation, with no real progress toward integrating the upper rank structure, the district court adopted a remedy that "promises realistically to work, and promises realistically to work now." (emphasis in original) Green v. County School Board, 391 U.S. 430, 439 (1968).

As this Court noted last term

> it is doubtful, given [the employer's] history in this

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> litigation, that the District Court had available to it any other effective remedy. That court, having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, would have been effective in ending petitioner's discriminatory practices.

Local 28, Sheet Metal Workers v. EEOC, 106 S.Ct. at 3056 (Opinion of Powell, J.).

The actions of the Patrol would have required a permanent one for one ratio in order to fully remedy, within this generation, the effects of the Patrol's adamant refusal to promote blacks. However, in the exercise of its equitable discretion, the district court's order, abandoning the one for one ratio as soon as a non-discriminatory promotion procedure was developed, proved a practical solution which reconciled both public and private needs. United States

v. Montgomery County Board of Education, 395 U.S. 225 (1969).

In framing remedial decrees, the federal courts act in a complex world in which it is at times impossible to reconstruct the past. If they are to be successful in meeting the demands for justice in the face of intransigent opposition, they must have the tools to implement remedies that are feasible and promising in their effectiveness.

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH CONGRESS, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL WOMEN'S LAW CENTER, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, WOMEN EMPLOYED, AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS PHILLIP PARADISE, JR., *ET AL.*

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OCTOBER TERM, 1986

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CONSENT OF THE PARTIES

Petitioner the United States of America (the "Government") and Respondents Phillip Paradise, Jr., *et al.*, the Alabama Department of Public Safety (the "Department") and Intervenors-Respondents ("Intervenors") have consented to the filing of this brief. Their letters of consent are being filed separately herewith.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were being deprived of their civil rights. The national and local offices of the Lawyers' Committee have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. The Lawyers' Committee participated in this case as an amicus curiae below in the Court of Appeals.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the constitutional rights of all Americans. It has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs to increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

The Mexican American Legal Defense and Educational Fund, Inc., is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Its attorneys have represented Hispanics in numerous employment discrimination cases.

The National Association for the Advancement of Colored People is a nonprofit corporation. Its principal objectives include promoting equality of rights, eradicating racial prejudice among the citizens of the United States and securing for them increased employment opportunities according to their ability.

The National Women's Law Center is a nonprofit legal advisory organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sexual discrimination from all facets of American life. Since 1971, it has worked to secure equal employment opportunity through full enforcement of the civil rights laws and the implementation of effective remedies for racial and sexual discrimination.

The Puerto Rican Legal Defense and Education Fund, Inc., is a national organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Hispanics.

Women Employed is a national organization of working women. It assists working women facing sexual discrimination and monitors the enforcement activities and policies of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance concerning a broad range of employment discrimination issues.

The Women's Legal Defense Fund is a nonprofit organization founded in 1971 to advance women's rights. It represents women in employment discrimination litigation, operates an employment discrimination counselling program, conducts public education and represents women's interests before the Equal Employment Opportunity Commission and other Federal agencies. A major priority for the fund is its project on Women of Color. In this pursuit of equality for both women and minorities, the Fund is committed to the use of affirmative action.

Amici conduct extensive litigation to eliminate employment discrimination, representing employees in both the governmental and the private sectors. In some of these cases, courts have entered consent decrees or adjudicated decrees that provide race- and sex-conscious hiring and promotional goals to remedy employers' past discrimination. The position argued by the Government, if adopted in full, would severely undermine the relief amici have obtained in these decrees. More importantly, such a result would straitjacket the courts and public

employers in their efforts to eradicate the lingering effects of prior discrimination. Although less drastic measures will in many cases be sufficient, some cases, including egregious cases like the instant one, have taught amici that the lingering effects of discrimination cannot always be eradicated without the very sort of race-conscious relief approved below.

STATEMENT OF THE CASE[1]

This case arises from litigation commenced in 1972 challenging the discriminatory employment practices of the Alabama Department of Public Safety (the "Department") in the state police force. In 1972, the district court found that the Department had engaged in a "blatant and continuous pattern and practice of discrimination" which had "permeated [its] employment policies". *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). This finding was based in part on the "unexplained and unexplainable" fact that the Department had never employed a black state trooper in its 37-year history. 340 F. Supp. at 705. The district court (1) enjoined the Department from discriminating against blacks in the future, and (2) ordered that 50% of all entry-level troopers hired be black until 25% of the state police force was black (the "1972 order"). The race-conscious goals in the 1972 order are not the subject of this proceeding. After the 1972 order had been in effect for three years, the court found that the Department, "for the purpose of frustrating or delaying full relief to the plaintiff class, [had] artificially restricted the size of the trooper force and the number of new troopers hired". Joint Appendix ("J.A.") 34.

In 1979, the parties entered into, and the district court approved, a consent decree (the "1979 decree") in which the Department promised to develop within one year a promo-

[1] Because of the procedural and factual complexity of this case, amici summarize it here only briefly. Amici respectfully refer the Court to the Statement of the Case of Respondents Phillip Paradise, Jr., *et al.*, and the opinion of the court below (767 F.2d 1514) for a comprehensive review of the facts.

tional procedure that had "little or no adverse impact on blacks". J.A. 37-48. Shortly thereafter, the court held that the 25% incumbency provision in the 1972 order applied to promotional positions as well as to entry-level trooper positions, emphasizing that "[i]n 1972, defendants were not just found guilty of discrimination against blacks in hiring to entry-level positions" and that "past discrimination by the Department was pervasive, that its effects persist, and that they are manifest". *Paradise v. Shoemaker,* 470 F. Supp. 439, 442 (M.D. Ala. 1979).

Until 1981, more than one year later than promised in the 1979 decree, the Department did not propose a selection procedure for promotions to corporal. The parties entered into a second consent decree (the "1981 decree"), which provided that a proposed procedure would be administered and then the parties would determine if the procedure had an adverse impact. If the parties could not agree whether it did, they agreed to submit the dispute to the district court. J.A. 49-54.

The Department administered its proposed procedure in 1981, and, after the parties failed to agree, the district court found that the Department still had not complied with the 1979 decree. *Paradise v. Prescott,* 580 F. Supp. 171, 174-75 (M.D. Ala. 1983). The court ordered the Department to submit a plan without an adverse impact on blacks to promote 15 persons to corporal. *Id.*

The Department then proposed to promote eleven whites and four blacks. J.A. 125-27. The district court rejected this proposal because the Department "operated under a regime of racism" (J.A. 140), the effects of which "remain pervasive and conspicuous at all ranks above the entry-level position". *Paradise v. Prescott,* 585 F. Supp. 72, 74 (M.D. Ala. 1983), *aff'd,* 767 F.2d 1514 (11th Cir. 1985), *cert. granted,* 106 S. Ct. 3331 (1986). The court found that:

> "Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still*

> *not one black.* Thus, the department *still* operates an upper ranks structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future." *Id.* (emphases in original).

Pursuant to the 1979 decree, the court ordered (the "December 1983 order") that one black be promoted for every white promoted to each rank (subject to the availability of objectively qualified black applicants) until either (a) 25% of the rank is black or (b) the Department develops a lawful promotional procedure. J.A. 128-29.[2] It is the constitutionality of the December 1983 order that is at issue here. *See United States v. Paradise,* 106 S. Ct. 3331 (1986) (granting certiorari).

SUMMARY OF ARGUMENT

This case exemplifies why race-conscious promotional relief is necessary and appropriate in certain circumstances. Upon finding "blatant and continuous discrimination" in 1972, the district court ordered (1) that the Department stop discriminating against blacks in hiring and promotions, and (2) that 50% of the entry-level troopers hired be black until 25% of the trooper force was black. *NAACP v. Allen,* 340 F. Supp. at 705-06. The Department has continuously frustrated that order. As of December 1983, nearly 12 years after the 1972 order, only 4 of 197 persons above entry level were black, none of whom was higher than the rank of corporal, and all of whom were promoted pursuant to an interim agreement pending implementation of the 1979 decree. *Paradise v. Prescott,* 585 F. Supp. at 74. The district court concluded that the effects of prior discrimination "will not wither away of their own accord" (*id.* at 75), and entered the provision presently at issue

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[2] The Department finally proposed a lawful selection procedure to the rank of corporal in June 1984. The district court approved this procedure and suspended the December 1983 order as it applied to promotions to that rank. *See Paradise v. Prescott,* 767 F.2d 1514, 1534-36 (11th Cir. 1985), *cert. granted,* 106 S. Ct. 3331 (1986).

requiring a one-for-one promotional ratio. In short, it is difficult to conceive of a case in which race-conscious remedies are needed more.

The December 1983 order passes muster under any standard of scrutiny. The first prong of Equal Protection analysis is satisfied because there is a compelling governmental interest not merely in ensuring future compliance with the civil rights laws but also in eradicating the lingering effects of the Department's prior discriminatory practices. Where, as here, the employer's discriminatory policies have permeated its organization and its subsequent practices have perpetuated that discrimination by tending to limit the supervisory and policy-making positions to persons who were hired, trained and promoted under a "regime of racism" (J.A. 140), the institutional bias against blacks is an effect of discrimination that must be eradicated. The argument of the Department and of Intervenors that promotional relief requires a finding of prior discrimination in promotions, as distinguished from hiring, misconstrues the record of the Department's discriminatory promotional practices and ignores the fundamental fact that the Department's blatant and continuous discrimination in entry-level positions necessarily has precluded blacks from competing for promotions.

The second prong of Equal Protection analysis is likewise met because the means are narrowly tailored to serve this compelling governmental interest. When this interest is properly understood to include eradicating the Department's institutional bias, a one-for-one promotional provision is clearly designed to effectuate that interest. The courts have a duty "so far as possible [to] eliminate the discriminatory effects of the past as well as [to] bar like discrimination in the future" (*Louisiana v. United States*, 380 U.S. 145, 154 (1965)), and the courts must be given latitude in fashioning remedies pursuant to this duty. The choice of an appropriate ratio, like any remedy for discrimination, "necessarily involve[s] a degree of approximation and imprecision". *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977). The

district court's choice was based on its determination, after observing the Department's recalcitrance for twelve years, that lesser measures could not adequately and expeditiously dismantle the Department's institutional bias. It is no more "extreme" than was the 50% ratio approved by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), or by lower courts facing similarly egregious circumstances. The alternatives proposed by the Government, compared with the relief ordered, are more intrusive on the Department, are more burdensome on whites and would not adequately address the need to eradicate the Department's institutional bias.

Finally, the one-for-one promotional order does not unnecessarily trammel the legitimate interests of whites. The provision for promotions is akin to the hiring goals discussed with approval in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986) ("*Sheet Metal Workers*") and *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986). Affected whites lose only the incremental benefits of a promotion rather than their livelihoods altogether, and even then the loss is often temporary.

In sum, the Department's history of continued discrimination far exceeds the level necessary to justify affirmative action. Although this Court unambiguously approved the use of race-conscious relief last term, the Government's position would render such relief practically unavailable. Indeed, the Government has publicly admitted this purpose by asserting that "it is doubtful" that race-conscious relief "can any longer survive", warning employers that legal challenges from private parties "and, yes, from the Government itself" are "inevitable".[3] This Court should not permit the Government to subvert its decisions nor remove race-conscious remedies from the arsenals of the lower courts.

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[3] Remarks of Wm. Bradford Reynolds before the Committee on Employment and Labor Relations Law of the Litigation Section and the Equal Employment Opportunity Committee of the Labor and Employment Law Section of the American Bar Association 10-11 (Aug. 12, 1986).

ARGUMENT

I. THE CONTINUED EXCLUSION OF BLACKS FROM THE UPPER RANKS OF THE STATE POLICE IS AN EFFECT OF PRIOR DISCRIMINATION AGAINST BLACKS. ERADICATING SUCH LINGERING EFFECTS OF DISCRIMINATION IS A COMPELLING GOVERNMENTAL INTEREST.

It is now established beyond peradventure that a public employer is not constitutionally barred from considering race pursuant to an affirmative action plan, even though minority persons who are not identified victims of past discrimination may benefit from such consideration.[4] *See Wygant*, 106 S. Ct. at 1850 (plurality opinion); *id.* at 1852 (O'Connor, J., concurring); *id.* at 1863 (Marshall, J., dissenting); *cf. id.* at 1867-68 (Stevens, J., dissenting); *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (plurality opinion); *id.* at 3054 (Powell, J., concurring). In an ideal society, race-conscious relief would be unneeded, but we have yet to achieve the ideal. Lesser relief, such as an injunction, is often adequate to remedy discrimination. Amici's experience has proven, however, that in some instances relief such as the December 1983 order must be used to move closer to the ideal. This is just such a case.

The issue presented is whether the December 1983 order violates the Equal Protection Clause. The first prong of Equal

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[4] Here, it would be impossible to grant meaningful relief if it were limited to identified victims of discrimination. Where, as here, there has been pervasive discrimination over a long period of time, it is impossible to prove who would have applied for a state trooper job but for the discrimination (*see United States v. Louisiana*, 225 F. Supp. 353, 397 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965)), or which blacks would have received jobs but for a discriminatory examination procedure (*see Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), *aff'd in relevant part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980)). In addition, those who suffered discrimination many years ago have probably obtained employment elsewhere, moved or otherwise are no longer in a position to embark upon a new career with the Department. Nonetheless, a court that has made such findings of discrimination has the duty to ensure effective integration of the Department.

Protection analysis is an inquiry into the governmental interests being vindicated.[5] Eradicating the lingering effects of prior discrimination is a sufficiently compelling governmental interest to justify race-conscious relief. *See Wygant,* 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring); *id.* at 1861-62 (Marshall, J., dissenting); *id.* at 1867-68 (Stevens, J., dissenting); *Sheet Metal Workers,* 106 S. Ct. at 3034, 3050 (plurality opinion); *id.* at 3055 (Powell, J., concurring).

Although the Government pays lip service to the governmental interest in remedying the effects of prior discrimination (Gov't Br. at 19, 21-22, 31-33),[6] it defines this interest so narrowly as practically never to justify the race-conscious relief that this Court unambiguously held last term may be necessary. Having redefined the governmental interest, the Government argues that the December 1983 order is supported only by notions of racial balancing, an inadequate governmental interest. Gov't Br. at 30-35. The governmental interest in eradicating the lingering effects of discrimination cannot, however, be so narrowly construed. This interest at times may include altering the institutional patterns that created and have perpetuated bias against blacks.

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[5] Although a majority of the Court has not agreed upon the level of scrutiny to be applied to affirmative action cases (*see Sheet Metal Workers,* 106 S. Ct. at 3052 (plurality opinion); *Wygant,* 106 S. Ct. at 1852-53 (O'Connor, J., concurring)), the members of the Court agree that some level of heightened scrutiny (whether "strict" or "intermediate") is appropriate (*Wygant,* 106 S. Ct. at 1852). Although all amici do not concede that affirmative action should be subjected to strict scrutiny (*see Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 357-63 (1978) (Brennan, J., concurring in part and dissenting in part)), this case does not raise the issue because the December 1983 order survives the strictest of scrutiny. *See, e.g., Sheet Metal Workers,* 106 S. Ct. at 3053 (plurality opinion).

[6] Citations to briefs are as follows: "Gov't Br." is to the Brief for the United States; "Dep't Br." is to the Brief of Respondents Alabama Department of Public Safety and Colonel Byron Prescott In Support of Petitioner; and "Intervenors' Br." is to the Brief of Intervenors-Respondents Supporting the Petitioner.

A. The Governmental Interest Is Not Merely in Stopping Discrimination, but Also in Eradicating the Lingering Effects of Past Discrimination.

The governmental interest here is not merely "to prevent discrimination in the future" but also "to dismantle prior patterns of employment discrimination". *Sheet Metal Workers,* 106 S. Ct. at 3049 (plurality opinion). There is a governmental interest in eradicating "the lingering effects of pervasive discrimination." *Sheet Metal Workers,* 106 S. Ct. at 3050 (plurality opinion). As the plurality in *Sheet Metal Workers* noted, "even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities". *Id.* at 3036.

The Constitution requires affirmative relief which goes beyond merely ensuring future compliance with the law.[7] As Justice Brennan observed in *Bakke:*

> "At least since *Green v. County School Board,* 391 U.S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and its companion cases . . . reiterated that *racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions.*" 438 U.S. at 362 (emphasis added; citations omitted).

Accord Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring).

In cases where discrimination permeates the employer's organization, eradicating the lingering effects of discrimination

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[7] The lower courts have distinguished between, on the one hand, "compliance" and "compensatory" relief, and, on the other, "affirmative relief". *See, e.g., Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm.,* 630 F.2d 79, 108-09 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 280-82 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); *Berkman v. City of New York,* 705 F.2d 584, 595-96 (2d Cir. 1983).

extends to dismantling the barriers "which have fostered racially stratified job environments". *Sheet Metal Workers*, 106 S. Ct. at 3037 (plurality opinion) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). The Department's discriminatory policies were born of persons to whom discrimination was the status quo, and those practices have been perpetuated because the supervisory and policymaking positions are still almost uniformly occupied by whites who have benefitted from—indeed, many of whom may have implemented—those policies.[8] When the discriminatory policies have so permeated the institution, the governmental interest in eradicating discrimination includes eliminating this self-perpetuating institutional bias.

The district court recognized this governmental interest when it entered the December 1983 order. The court found that the Department had "operated under a regime of racism" (J.A. 140), and it said that the order was justified because of "the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination". *Paradise v. Prescott*, 585 F. Supp. at 75 n.1. The court recounted the history of the case and pointed out that the Department had stubbornly avoided hiring and promoting blacks for as long as possible, frustrating the spirit of the 1972 order and the letter of 1979 and 1981 decrees. The court found that there were virtually no blacks in the upper ranks (*id.* at 74), clearly recognizing that the "regime of racism" would not cease until supervisory and policymaking positions were in part filled with blacks and court-approved nondiscriminatory policies were in effect.[9]

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[8] The district court found that "the [D]epartment *still* operates an upper ranks structure in which almost every trooper obtained his position through procedures that totally excluded black persons." *Paradise v. Prescott*, 585 F. Supp. at 74 (emphasis in original). Moreover, absent discrimination, some blacks should have been hired and promoted instead of some whites, and all of the whites continue to benefit from the institutional bias against blacks.

[9] The district court enunciated a second interest furthered by its order: remedying the Department's failure, in violation of the consent decrees, "to develop acceptable promotion procedures". *Paradise v. Prescott*, 585 F. Supp. at 75 n.1. The Government characterizes the

B. The Record Demonstrates That the Department Is Permeated with Discrimination.

The evidence of discrimination in the present case is overwhelming. This Court has already recognized this as a case where the employer's organization is permeated with discrimination. In *Sheet Metal Workers*, Justice Brennan quoted *NAACP v. Allen* for the proposition that "[a]ffirmative action . . . 'provide[s] an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.' " 106 S. Ct. at 3037 (quoting 493 F.2d 614, 621 (5th Cir. 1974)).

The Government is seemingly unable to decide the extent to which this discrimination needs to be eradicated. On the one hand, it admits that "the Department's hiring discrimination for almost four decades had excluded blacks from any jobs at all, including jobs in the upper ranks" (Gov't Br. at 21), and it concedes that it argued below that the Department's continued refusal to implement lawful promotional procedures "suggests that a pattern of discrimination against blacks in the Department . . . may be continuing" (Gov't Br. at 9; *see also Paradise v. Prescott*, 767 F.2d at 1522 n.10.). On the other hand, it argues that the 1972 order is "designed to cure the effects of the Department's *prior* discrimination in *hiring*" (Gov't Br. at 22 (emphases added)), suggesting that the discrimination is over and was limited to hiring.[10] The Department and Intervenors

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means used to effectuate this interest as "*in terrorem*". *See* Gov't Br. at 23-26. As Justice Powell noted in *Sheet Metal Workers*, however, there is a "societal interest in compliance with the judgments of federal courts." 106 S. Ct. at 3055. More importantly, the alleged "*in terrorem*" effect arises only because the Department wants to avoid promoting blacks, a desire which is itself an effect of discrimination that must be eliminated. *See* p. 24, *infra*.

[10] The Government also argues that *Sheet Metal Workers* establishes that there must be "flagrant and egregious discrimination" before race-conscious relief can be ordered. *See* Gov't Br. at 28-29; *see also* Intervenors' Br. at 14. The Government completely ignores, however, that the plurality in *Sheet Metal Workers* went on to say, "[*o*]*r*, such relief may be necessary to dissipate the lingering effects of pervasive discrimination" (106 S. Ct. at 3050 (emphasis added)), which is certainly true here. Moreover, the cited portion of *Sheet Metal Workers* applies only to the lawfulness of nonconsensual race-

now adopt the latter view, simply denying that the record of discrimination demonstrates discrimination in promotions. The record of discrimination here, however, is limited neither to hiring nor to discrete employment decisions in the past.

1. **Discrimination in hiring limits the promotional opportunities of blacks, particularly when the employer promotes solely from within.** Although the Government concedes that the Department's hiring discrimination has necessarily excluded blacks from the upper ranks (Gov't Br. at 21), the Department argues (as do Intervenors) that there has never been "a judicial determination that the racial disparity among the ranks were [sic] related in any way to the findings of discrimination in *hiring* in 1972" (Dep't Br. at 25 (emphasis in original); *see also* Intervenors' Br. at 11-12). Where, as here, the employer promotes only from within, the argument that "blatant and continuous" discrimination that has "permeated the [Department's] employment policies" (*NAACP v. Allen*, 340 F. Supp. at 705) can be so compartmentalized is untenable.

This Court has previously rejected the view that findings of discrimination "can be viewed in isolation" in the context of school desegregation (*Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 (1973)), and several courts have recognized that a "natural consequence of discriminating against blacks at entry-level positions . . . would be to limit their opportunities for promotion to higher levels". *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1838 (N.D. Ala. 1981) (Pointer, J.), *aff'd*, 720 F.2d 1511 (11th Cir. 1983).[11] The exclusion of blacks is reinforced by a policy of promoting only from within the Department.

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conscious relief under Title VII (*see id.* at 3050), which is not presently at issue. *Wygant* makes clear that the constitutional standard for affirmative action is not "flagrant and egregious" discrimination. 106 S. Ct. at 1848 (plurality opinion) ("sufficient evidence to justify the conclusion that there has been prior discrimination"); *see also id.* at 1856 (O'Connor, J., concurring). Finally, the blatant and continuous discrimination here would meet any standard, even "flagrant and egregious".

[11] *See also Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Williams v. Vukovich*, 720 F.2d 909, 924 (6th Cir. 1983).

2. **The record contains findings of discrimination in promotions.** This is not, however, a case in which the discrimination was limited to hiring, a fact that the Department and Intervenors conveniently overlook. First, the district court found that the Department's proposed procedure for promotions (*see* J.A. 55-57) had an adverse impact against blacks (*Paradise v. Prescott*, 580 F. Supp. at 174), which would have established a prima facie case of discrimination if the Department had used that procedure. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Second, when the district court held that the 25% provision of the 1972 order applied to the Department's upper ranks, it said that "[i]n 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions", that "[o]ne continuing effect of that discrimination is that . . . *there is still not one black*" above the rank of trooper and "that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest". *Paradise v. Shoemaker*, 470 F. Supp. at 442 (emphasis in original). Third, before entering the December 1983 order, the district court found:

> "On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black*. Of the 25 captains, *there is still not one black*. Of the 35 lieutenants, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. And of the 66 corporals, *only four are black*. Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future." *Paradise v. Prescott*, 585 F. Supp. at 74 (emphases in original).

See also J.A. 139-40. These findings reveal that of the 197 persons above the rank of trooper, only 4 (2.0%) were black (*id.*), which itself gives rise to an inference of discrimination in promotions. *See Teamsters*, 431 U.S. at 340 n.20; *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977); *Wygant*, 106 S. Ct. at 1847 (plurality opinion); *id.* at 1856 (O'Connor, J., concurring). In short, the findings of discrimination from 1972 to the present, and the governmental interest in eradicating the effects of that discrimination, are not limited to hiring.

3. **The Department has a pervasive institutional bias against blacks.** When an employer has been found guilty of discrimination, compensatory relief and an order requiring future compliance will often sufficiently remedy past discrimination. *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion). In cases where the employer's discriminatory policies have instilled an institutional bias against blacks, and the policymakers who implemented those policies continue to make decisions that perpetuate the bias, affirmative relief may be necessary. This is such a case.

Before the 1972 order, the Department did more than close its ranks to blacks; it actively sought to prevent black citizens from exercising their constitutional rights. For example, in 1965, when blacks marched in Montgomery, Alabama, to secure the right to vote, the marchers were brutally "prodded, struck, beaten and knocked down by members of the Alabama State Troopers". *Williams v. Wallace*, 240 F. Supp. 100, 105 (M.D. Ala. 1965) (Johnson, J.). The Department attacked the marchers even though they "had observed all traffic laws and regulations" and "had proceeded in an orderly and peaceful manner". *Id.* The Department's actions, which had "not been directed toward enforcing any valid law of the State of Alabama" (*id.*), were taken by troopers "acting upon specific instructions from [their] superior officers", including the Department's director. *Id.* The Department's brutality precipitated the Voting Rights Act of 1965. D. Bell, *Race, Racism*

and American Law 147-48 (2d ed. 1980); President's Remarks to Congress, 1 Weekly Comp. Pres. Doc. 52 (Aug. 6, 1965).[12]

The Department's bias against blacks continues in its employment practices. The Department completely excluded blacks before the 1972 order, and it unfairly treated those blacks it hired under that order. From 1972 through 1975, the Department hired 69 entry-level troopers, 40 of whom were black and 29 of whom were white. After the one-year probationary period, during which all of the new troopers' supervisors were white, the attrition rate for blacks was unusually high: only 27 of the 40 blacks (67.5%) remained, while all 29 whites did. *Paradise v. Prescott*, 767 F.2d at 1519. This disparity is sufficient to create a prima facie case of discrimination.[13] In addition, the Department's decision to weigh supervisors' evaluations as 20% of the promotional score (J.A. 56) would have provided a ready mechanism for racial discrimination by the white supervisors. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 432-33 (1975); *Riles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985); *Rowe v. General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972).

The Department has perpetuated this atmosphere of discrimination by limiting blacks to the lower ranks It agreed in the 1979 decree to create a nondiscriminatory promotional procedure by 1980, but it failed to do so until 1984 despite repeated court orders. By 1983, the Department had promoted only 4 blacks, and then it did so only pursuant to the court-ordered 1979 decree. *Paradise v. Prescott*, 767 F.2d at 1533 n.16; *see also* J.A. at 47. The Department's continued attempts to avoid promoting blacks led even the Government to recognize below "that a pattern of discrimination against blacks in the Department . . . may be continuing." Gov't Br. at 9;

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[12] The Department's brutality toward black citizens described above is not an isolated instance. *See, e.g., Houser v. Hill*, 278 F. Supp. 920 (M.D. Ala. 1968).

[13] The disparity in the attrition rates is, using a simple chi square analysis, significant at the .01 level, which exceeds the .05 level of significance sufficient to establish a prima facie case. *See Hazelwood*, 433 U.S. at 308-09 n.14.

Paradise v. Prescott, 767 F.2d at 1522 n.10. The Department's recalcitrance demonstrates that institutional bias against blacks perpetuates itself by limiting the upper ranks to persons to whom discrimination is the status quo. This is a case where the institutional bias will begin to crumble only by ordering affirmative relief to ensure that minority persons occupy some supervisory and policymaking positions.

C. An Additional Effect of Discrimination Is a Less Responsive and Less Effective Police Force.

The governmental interest in eradicating the effects of discrimination is not limited to eliminating discriminatory employment practices. A public employer's discriminatory employment policies also affect the community it serves.

It is more important for a governmental employer than for a private employer to be free from even the appearance of excluding minorities. *See e.g., Williams v. Vukovich*, 720 F.2d at 923-24. In making Title VII applicable to the states, Congress recognized that the "exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 415, 92nd Cong., 1st sess. 10 (1971); *see also Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring).

This mistrust undermines the effectiveness of the police force, because "[i]n order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 167 (1967) (*"Task Force Report"*); *see also* U.S. Commission on Civil Rights, *Who Is Guarding the Guardians?* (1981). Justice Stevens recognized in *Wygant* that an integrated police force is more likely to be publicly accepted and therefore more effective (106 S. Ct. at 1868), a proposition with which the First,

Second, Fourth, Fifth, Sixth and Seventh Circuits have agreed.[14]

II. THE DECEMBER 1983 ORDER IS A SUFFICIENTLY NARROWLY TAILORED MEANS TO EFFECTUATE THE COMPELLING GOVERNMENTAL INTEREST IN ERADICATING THE LINGERING EFFECTS OF PAST DISCRIMINATION.

The second prong of Equal Protection analysis is to determine whether the means chosen is sufficiently related to effectuating the governmental interest. *Wygant*, 106 S. Ct. at 1846 (plurality opinion). The December 1983 order is well suited to eradicating the lingering effects of past discrimination, and it therefore satisfies the heightened scrutiny—be it characterized as strict or intermediate (*see* n.5, *supra*)—applicable to affirmative action.

This Court held unambiguously last term that race-conscious means may sometimes be used to remedy past discrimination. The Government pays lip service to the Court's approval of the use of race-conscious relief, but its analysis

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[14] *See Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982); *Bridgeport Guard, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333, 1341 (2d Cir. 1973); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of Chicago*, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc). For example, the Sixth Circuit said:

> "[E]ffective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions." *Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696.

Moreover, the Fourth Circuit has found "the attainment of racial diversity *in the top ranks* of the police department" to be a legitimate interest. *Talbert v. City of Richmond*, 648 F.2d at 931 (emphasis added); *accord Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 695; *Williams v. Vukovich*, 720 F.2d at 923; *Task Force Report* at 172.

reveals that it seeks to so restrict the use of such relief as practically to remove it from the courts' arsenal of weapons to combat the effects of discrimination. The flaw in the Government's analysis is its overly restrictive view of the governmental interest in remedying past discrimination. Once this governmental interest is properly understood to include eradicating the lingering effects of discrimination, the means necessary to effectuate that interest can be seen to include sufficient promotional relief to eliminate the self-perpetuating bias of the institution. The December 1983 order is well suited to effectuate this interest because it ensures that blacks will finally occupy some positions in the Department's upper ranks from which the institutional bias was born. The alternative means suggested by the Government are less efficacious than the December 1983 order, would be even more intrusive on the Department and more burdensome on whites. Finally, the December 1983 order does not unnecessarily trammel the interests of whites because it does not interfere with their legitimate expectations.

A. The December 1983 Order Is More Efficacious than a 25% Ratio in Eradicating the Effects of Past Discrimination.

The governmental interest in remedying past discrimination, as shown above (*see* pp. 11-12, *supra*), goes beyond ensuring compliance with the law and extends to eradicating the "informal mechanisms [that] may obstruct equal employment opportunities". *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion). When the governmental interest is thus understood, the means may reach beyond ensuring mere compliance with the law to include affirmative relief.

1. **The December 1983 order is aimed at eradicating the institutional bias.** Clearly, eradicating the institutional bias against blacks that permeates the Department requires more than hiring blacks into entry-level positions. It requires promoting qualified blacks into supervisory and policymaking positions. The December 1983 order accomplishes exactly this purpose.

The remaining question concerns the district court's choice of a one-for-one ratio rather than a lower ratio. The Government describes the ratio as a "catch up quota" aimed to create a racial balance for its own sake. Gov't Br. at 30-31. In fact, however, the choice of a one-for-one ratio assures that more than a token few blacks will soon be promoted into the upper ranks. The district court's choice of this ratio evinces a problem-solving approach based on its conclusion that institutional bias persists; it does not stem from an abstract, rigid conception of desired racial balance. *See* p. 12, *supra*.

The district court was faced with the Department's repeated failure to establish "acceptable procedures for advancement of black troopers into this [upper rank] structure" (*Paradise v. Prescott*, 585 F. Supp. at 74) and the Department's continued refusal to hire or promote blacks until it could avoid doing so no longer. In 1979, the district court concluded that "there is no ambiguity" that the 25% provision of the 1972 order, roughly akin to a long term incumbency goal, applied to promotional positions. *Paradise v. Shoemaker*, 470 F. Supp. at 440. Even so, although blacks had been hired to entry-level positions for seven years, none had then been promoted, and the four who were promoted subsequently were promoted only pursuant to the court-ordered 1979 decree. The court legitimately concluded that more than a token number of blacks were needed in the upper ranks to make the institution's attitudes race-neutral. As in *Sheet Metal Workers*, "in light of [the Department's] long record of resistance to official efforts to end [its] discriminatory practices, stronger measures were necessary". 106 S. Ct at 3053 (plurality opinion).

The courts have "not merely the power but the duty to render . . . decree[s] which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". *Louisiana v. United States*, 380 U.S. at 154; *see also Albemarle Paper Co.*, 422 U.S. at 418. To do so, they must be given wide discretion "to fashion 'the most complete relief possible' to remedy past discrimination". *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion) (quoting

Franks v. Bowman Transp. Co., 424 U.S. 747, 770 (1976)). The selection of an appropriate remedy for discrimination "will necessarily involve a degree of approximation and imprecision". *Teamsters*, 431 U.S. at 372; *see also* Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L. J. 887, 893 ("*Public Law By Private Bargain*").

The district court's choice of a one-for-one ratio is within this broad remedial discretion. The alternatives of an injunction against promotional discrimination and of the 1972 order's 25% incumbency provision as applied to promotions had proven ineffective. Under similar circumstances, this Court said:

> "[I]t is doubtful, given [the employer's] history in this litigation, that the District Court had available to it any other effective remedy. That court, having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending [the employer's] discriminatory practices." *Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J., concurring).

Indeed, the *Sheet Metal Workers* plurality cited *NAACP v. Allen*, which involved the 50% hiring order, as an example of a case in which "alternative remedies" were unavailing because of the employer's "long record of resistance to official efforts to end [its] discriminatory practices". *Id.* at 3053.

The Government calls the one-for-one ratio "extreme", arguing that a 25% ratio "represented the extreme outer limit of any appropriate remedy". *See* Gov't Br. at 27-28. Far from extreme, however, the one-for-one ratio is comparable to the 50% provision approved in *Weber*, which Justice Blackmun described as "moderate". 443 U.S. at 216. The lower courts, faced with the difficult task of fashioning effective remedies for past discrimination in varying circumstances, have on occasion found ratios of 50% to be necessary.[15]

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[15] The plurality in *Sheet Metal Workers* cited with approval several cases that approved ratios of 50%, including the Eleventh Circuit's decision below in this case. *See* 106 S. Ct. at 3037 n.28; *see,*

Moreover, the Government's argument would restrict the courts to using the ratio which the employer would be expected to achieve if it stopped further discrimination against blacks. *See Teamsters*, 431 U.S. at 340 n.20; *Hazelwood*, 433 U.S. at 307. In short, the Government seeks to restrict courts to ensuring future compliance with the law without providing any remedy for past discrimination. The plurality in *Sheet Metal Workers* made clear, however, that some cases may require more than mere compliance relief:

> "In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII." 106 S. Ct. at 3036.

Similarly, lower courts have distinguished "compliance relief" from "affirmative relief", the latter of which may entail the use of higher short term goals designed to effectuate a long term goal approximating the racial composition of the available labor force. *See* n.7, *supra*.[16]

Affirmative action plans, including those embodied in consent decrees, typically contain both long term goals and higher short term goals designed to effectuate expeditiously the long term goals. *Public Law By Private Bargain*, 1984 Duke

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e.g., Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Morgan v. Kerrigan*, 530 F.2d 431, 434-35 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 377 (8th Cir. 1973); *see also United States v. City of Buffalo*, 633 F.2d 643, 646-47 (2d Cir. 1980); *Bratton v. City of Detroit*, 704 F.2d 878, 892-98 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[16] Many of the cases cited with approval by the plurality in *Sheet Metal Workers* approved the use of higher short term goals to meet long term goals. *See* 106 S. Ct. at 3037 n.28; *see, e.g., Paradise v. Prescott*, 767 F.2d at 1530-33; *United States v. City of Chicago*, 549 F.2d 415, 436-37 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *modified on other grounds*, 663 F.2d 1354, 1362 (7th Cir. 1981) (en banc); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

L. J. at 896. If short term goals could not exceed the expected racial composition of the employer's work force, then employers who had previously excluded minorities would be unable to eradicate the lingering effects of discrimination until the work force had completely turned over, a period which could take as long as 40 years. *See also* p. 26 & n.18, *infra.*

2. **The December 1983 order is properly designed to encourage the Department to implement a lawful promotional procedure.** The district court designed the December 1983 order both to eradicate the effects of discrimination and to encourage the Department to create a lawful promotional procedure. *Paradise v. Prescott,* 585 F. Supp. at 76. The Department's continued failure to develop a lawful procedure violated the spirit of the orders dating back to the 1972 order and the letter of the 1979 and 1981 decrees, whereas the December 1983 order successfully encouraged the Department to comply with the prior orders.

The Government describes the December 1983 order as an "*in terrorem*" enforcement device, suggesting that the order goes beyond the governmental interests giving rise to it. Gov't Br. at 23-26. The Government is wrong. The order resulted from the Department's repeated failure to implement a lawful promotional procedure, which in turn resulted from the Department's institutional bias. The order is narrowly tailored to eliminating this bias because it gives the Department the opportunity to begin dismantling the bias itself—by developing lawful promotional procedures—and, if the Department fails, the order reduces the bias directly by requiring the promotion of qualified blacks. The lower courts have characterized comparable orders as "modest" "interim relief".[17]

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[17] *E.g., Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm.,* 630 F.2d at 109.

B. The December 1983 Order Is Less Intrusive on the Department and Less Burdensome on Whites than the Alternatives Proffered by the Government.

The Government asserts that the courts below did not consider "whether lawful alternative and less restrictive means could have been used" to achieve the compelling governmental interest in remedying pervasive and egregious discrimination. Gov't Br. at 23 (quoting *Wygant*, 106 S. Ct. at 1850 n.6 (plurality opinion)). The Government then proffers "plentiful alternatives" that supposedly would be "less intrusive". *Id.* at 25-26. The Government's alternatives, however, actually would be more intrusive on the Department's employment practices and would be more burdensome on whites than is the December 1983 order.

First, the Government suggests that "[t]he court could have imposed stringent contempt sanctions, including heavy fines and attorneys' fees". Gov't Br. at 25. There is no reason to believe that such sanctions would have worked because the Department had repeatedly disobeyed prior court orders. Indeed, the December 1983 order achieved in only seven months what prior court orders had failed to do after four years—to compel the Department to implement a lawful, nondiscriminatory promotional procedure. Money sanctions would harm only Alabama's taxpayers and would not address the true problem—the Department's entrenched institutional bias.

In addition, the December 1983 order more effectively accommodates the immediate interests of all interested parties than would contempt sanctions. The Department needs new corporals; black troopers are interested in being promoted and in seeing the effects of discrimination eliminated; and white troopers are interested in being promoted. Because the 1981 decree bars promotions until the Department implements a lawful selection procedure (J.A. 53), all of these interests would have been frustrated by contempt sanctions. In contrast, the December 1983 order encourages the Department to develop a lawful selection procedure and it accommodates all of these interests by allowing promotions to proceed.

Second, the Government submits that "[t]he court could have considered appointing a trustee or administrator to supervise the Department's progress or even to make the promotions himself by the proper standard". Gov't Br. at 25. However, this alternative would be even more intrusive on the Department's employment practices than the one-for-one ratio because the district court would become embroiled in the merits of each promotional decision.

Moreover, the December 1983 order is both a temporary measure and allows for waiver of its requirements if there are not enough qualified black candidates or if the Department does not need more promotions. It thus accommodates "*legitimate* explanations for the [Department's] failure to comply with the court's orders". *Sheet Metal Workers*, 105 S. Ct. at 3051 (plurality opinion) (emphasis in original); *id.* at 3055-56 (Powell, J., concurring); *id.* at 3061-62 (O'Connor, J., concurring in part and dissenting in part).

Third, the Government proposes a 25% ratio. Gov't Br. at 28. As shown above, a lower ratio would not as effectively further the compelling governmental interest. *See*, pp. 20-24, *supra*. In addition, a lower ratio would be more burdensome on whites in the sense that affirmative action plans would have to be in effect much longer to achieve the long term objective of 25%. *Cf. Sheet Metal Workers*, 106 S. Ct. at 3053 (plurality opinion) (affirmative action must be temporary); *Weber*, 443 U.S. at 208-09.[18]

Fourth, the Government suggests that "[p]rogress toward racial balance in the [Department's] upper levels" would be "substantially expedited" by (1) reducing time-in-grade eligibility requirements or (2) allowing lateral hiring of blacks and whites to upper-level positions. Gov't Br. at 35 n.17. Like the appointment of a trustee, these alternatives would be more

[18] The Department recently submitted to the district court an estimate of the number of vacancies in its upper ranks for the next decade. In the lieutenant position, for example, the Department's figures indicate that affirmative action would end in 1991 with a 50% ratio but not until 1997 with a 25% ratio.

intrusive on the Department. Moreover, because they would increase dramatically the number of candidates eligible for promotional positions, these alternatives would reduce the expectation of promotion held by present white employees (particularly Intervenors) at least as much as race-conscious promotional goals would.

C. The December 1983 Order Does Not Unnecessarily Trammel the Legitimate Interests of Whites.

In *Wygant* and *Sheet Metal Workers*, this Court made clear that under appropriate circumstances race-conscious hiring is permissible. *See Wygant*, 106 S. Ct. at 1851-52 (plurality opinion); *id.* at 1864 (Marshall, J., dissenting); *id.* at 1870 n.14 (Stevens, J., dissenting); *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (plurality opinion); *id.* at 3057 (Powell, J., concurring). In contrast, four members of the Court in *Wygant* found that layoffs, under the circumstances presented, were unconstitutional. *Wygant*, 106 S. Ct. at 1851-52 (plurality opinion); *id.* at 1857-58 (White, J., concurring).[19] The Government tries to equate the promotional provision at issue here with the layoff provision in *Wygant* (Gov't Brief at 32-35), but the often temporary denial of a promotion is far less burdensome than the loss of employment.

In *Wygant*, the plurality found the layoffs too burdensome because (1) employees "are typically heavily dependent on wages for their day-to-day living", (2) the layoffs disrupted "settled expectations in a way that general hiring goals do not", and (3) the burdens were borne by identifiable individuals. 106 S. Ct. at 1851-52. Each of these factors distinguishes race-conscious promotional provisions from layoffs.

The denial of a promotion does not interfere with an employee's day-to-day living in the way that a layoff does. The white employees keep their jobs and their sources of income.

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[19] Justice O'Connor said that it was not necessary "to resolve the troubling questions of whether any layoff provision could survive strict scrutiny". 106 S. Ct. at 1857; *see also id.* at 1867 n.7 (Marshall, J., dissenting).

Although some whites may not receive the pay increase from a promotion, this incremental difference is very small compared to a complete loss of income. As with hiring provisions, the effect on whites of promotional provisions is the "[d]enial of a future employment opportunity [that] is not as intrusive as [the] loss of an existing job." *Wygant*, 106 S. Ct. at 1851 (plurality opinion). Moreover, because the whites who are denied promotions remain free to compete for later vacancies, the loss of promotional pay is often of short duration.

Nor do employees' expectations favor equating promotions and layoffs. Certainly the expectation of keeping one's job is much greater than the expectation of receiving a promotion. As the First Circuit recently said:

> "There is no blinking the fact that there is a significant difference between hiring and promoting in accord with a race-conscious ratio and insulating from discharge a percentage of employees because they are members of a minority group. In the former situation, there is only a postponement of expectations; in the layoff situation, employees with greater seniority lose their jobs." *Boston Chapter, NAACP v. Beecher*, 679 F.2d at 976.

Moreover, the expectation of a promotion is comparable to that of being hired because generally the candidate is merely one of a pool of applicants competing against others for a job or promotion.[20]

No individual white trooper has a settled expectation of promotion. When a selection procedure has an adverse impact

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[20] Both hiring and promotional procedures typically include factors such as a written examination and evaluations by interviewers. The distinguishing feature between them is that promotional procedures often contain an additional seniority factor. The Government emphasizes this distinction, presumably to support the notion of whites' expectations, arguing that "[e]ligibility for promotion is a major part of the 'equity' in seniority". Gov't Br. at 39-40. In fact, although the promotional procedure that the Department proposed in 1981 would have counted seniority as 10% of the promotional score (J.A. 56), *differences* in seniority could affect scores by no more than 3% (*see* J.A. 50-51). Thus, greater seniority far from creates an expectation of promotion.

against blacks, as the Department's proposed promotional procedure here did, whites have no legitimate expectation of promotion based on that procedure.[21] As Justice Brennan wrote in *Bakke*, "the expectations of non-minority workers are themselves products of discrimination and hence 'tainted' ". 438 U.S. at 365 (quoting *Franks*, 424 U.S. at 776). In addition, any white trooper's expectation of promotion should have been reduced by the existence of affirmative action since the 1972 order setting forth a 25% incumbency provision. *See Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696 n.12.

Finally, the Government's argument that the burden of the December 1983 order falls "on a finite and often small number of identifiable individuals" (Gov't Br. at 33) ignores that in making promotional decisions, Alabama uses a "rule of three" whereby the Department may select any one of the three candidates who scores highest. *See* J.A. 126. The white individual who would have been promoted but for affirmative action thus cannot be identified; rather, the burden is in this sense "diffused" among the three highest-ranking candidates. Furthermore, there was in place no *lawful* selection procedure that could identify a burdened individual. In any event, the basic inquiry is not whether the procedure allows affected white persons to be identified but whether their legitimate interests are unduly trammelled. *See Local 35, Int'l Bhd. of Elec. Workers v. City of Hartford*, 462 F. Supp. 1271 (D. Conn. 1978), *aff'd*, 625 F.2d 416 (1980), *cert. denied*, 453 U.S. 913 (1981). Here they are not.

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[21] *See NAACP v. Allen*, 493 F.2d at 618; *Kirkland v. New York State Dep't of Corrections*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Williams v. Vukovich*, 720 F.2d at 924-25; *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975).

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

September 30, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, ILLINOIS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, WEST VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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W. Va. Exec. Order 16-78	2
Wisc. Stat. Ann. § 16.765 and 230.01 *et seq.* (West Supp. 1985)	2
Wisc. Stat. Ann. §§ 111.31-111.395 (West Supp. 1985)	3
Wisc. Exec. Orders Nos. 9, 26 and 28	2
OTHER AUTHORITIES:	
Brief of the Lawyers' Committee for Civil Rights Under Law filed in No. 84-1999, *Local 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 106 S. Ct. 3063 (1986)	10
H.R. Rep. No. 92-238, 92nd Cong., 1st. Sess. 17 (1971)	12
National Advisory Commission on Criminal Justice Standards and Goals: *Police* (1973)	10
National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice To Insure Domestic Tranquility* (1969)	10
National Commission on Law Observance and Enforcement: *Report on the Causes of Crime* (Vol. I, 1931)	11

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Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies* 67 Va. L. Rev. 1235 (1981) 7

President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967) 10

Report of the National Advisory Commission on Civil Disorders (1968) 10

Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971) 12

INTEREST OF AMICI CURIAE

Amici States respectfully submit this brief in support of the respondent. *Amici* urge this court to affirm the judgment of the court below and thus affirm the district courts' broad discretion to fashion or approve necessary and appropriate race-conscious affirmative relief – such as the interim promotion goal challenged herein – in order to redress racial discrimination.

Amici recognize the paramount importance of remedying racial discrimination. Clearly the courts, exercising their responsibility to enforce the Fourteenth Amendment, have played a critical role in bringing about the substantial progress the Nation has made over the last two decades toward overcoming the legacy of slavery. That progress cannot continue unless both courts and governmental bodies retain substantial latitude in devising the means necessary "to eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Amici* have an interest in this case both because of their interest in preserving the ability of public employers to develop effective voluntary measures to eliminate the effects of past discrimination on their work forces and their interest in ensuring that federal and state laws forbidding employment discrimination are effectively enforced.

However, while it is essential that courts and other governmental bodies have authority to take strong measures to achieve full compliance with the laws and constitution, remedial measures that adversely affect third parties to a significant extent should not be employed routinely. The court-imposed use of such measures should be reserved for cases involving egregious or longstanding discrimination and even then only where necessary to effect full compliance.

All of the *Amici* have initiated voluntary affirmative action programs to eliminate the effects of past discrimination and

ensure equal opportunity of public employment.[1] More specifically, all of the *Amici* possess state trooper or other state public safety forces and recognize the particularly compelling need for a significant representation of minorities at all levels of public safety employment. *Amici* believe that integrated state public safety forces are necessary in order to curtail racially-motivated improprieties, lessen racial tension, and greatly increase respect for the law and cooperation with law enforcement officials.

Many of the *Amici* have state enforcement agencies charged with the responsibility of enforcing state anti-discrimination laws.[2] *Amici* also have a strong interest in preserving these agencies' latitude to fashion appropriate race-conscious affirmative relief for the redress of discriminatory violations under state law.

The State of New York, by Robert Abrams, Attorney General of the State of New York, and other *Amici* submit this brief pursuant to Supreme Court Rule 36.4.

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[1] *See*, N.Y. Exec. Law § 296(12) (McKinney 1985), N.Y. Exec. Orders Nos. 6 and 21, reported in 8A Fair Emp. Prac. Man. (BNA) 455:3071-72; Cal. Gov't Code §§ 19400-19406, 19790-19798 (West 1980), Cal. Exec. Orders Nos. B-85-81 and D-20-83, reported in 8A Fair Emp. Prac. Man (BNA) 453:853; Ill. Ann. Stat. ch. 68, §§ 2-105 and 7-105 (Smith-Hurd Supp. 1985); LA. Exec. Order No. 13, Louisiana Register Vol. I, p. 7 (September 25, 1972); MD. Exec. Order dated December 9, 1970 (Code of Maryland Register 01.01.1976.05) reported in 8A Fair Emp. Prac. Man. (BNA) 455:655; Mich. Comp. Laws Ann. § 37.2210 (West Supp. 1985), Mich. Exec. Order 1985-2; Minn. Stat. Ann. §§ 43A.19, 43A.191 (West Supp. 1986); W. Va. Exec. Order 16-78, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3026; Wis. Stat. Ann. §§ 16.765 and 230.01 *et seq.* (West Supp. 1985), Wis. Exec. Orders Nos. 9, 26 and 28, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3217-3218.

[2] *See*, N.Y. Exec. Law § 290 *et seq.* (McKinney 1985) (establishing authority of the New York State Division of Human Rights); Cal. Gov't Code Sec. 12900 *et seq.* (West 1980) (establishing authority of the California Fair Employment and Housing Commission); Ill. Rev. Stat. ch. 68, ¶¶ 7-101, 8-101 *et seq.* (1985) (establishing authority of the Illinois Department of Human Rights and Illinois Human Rights Commission); MD. Code Ann. Art. 49B (West 1979) (establishing authority of the Maryland Human Relations Commission); Mich. Const. Art. V, § 29, Mich. Comp. Laws Ann. § 37.2101 *et seq.* (West Supp. 1985)

(Footnote continued)

SUMMARY OF ARGUMENT

This Court has already held that courts may employ race-conscious measures in order to remedy unconstitutional racial discrimination in employment. The Court has closely scrutinized the use of remedial race-conscious measures and has recognized that the need to remedy unconstitutional discrimination is a sufficiently compelling governmental purpose to justify such measures. Similarly, under certain circumstances, a state's interest in establishing a representative workforce which can better provide effective law enforcement or other critical governmental services may constitute a compelling government interest that is sufficient to justify use of race-conscious measures in employment.

Nevertheless, the Court has cautioned that while the district court is not required to order the least restrictive remedy, care should be taken to avoid unnecessarily trammelling the rights of third persons who might be adversely affected.

In this case the district court was presented with a longstanding pattern of racial exclusion and a conspicuous failure of the defendant to take needed steps to end its unconstitutional practices and cure their effects. Under these circumstances, the district court acted well within the scope of its authority when it ordered the defendants to promote blacks on a one-to-one basis until they develop job-related promotional procedures without an adverse impact. Its action was appropriate because it was necessary to effect compliance, was flexible in that it did not require promotion of unnecessary or unqualified officers, was of limited duration for it remained in effect for only one round of promotions, did not unduly burden non-minorities — only eight (8) corporal positions were filled by blacks as a result of the court's order — and the long term goal established by the order was related to the representation of blacks in the appropriate labor market.

(establishing authority of the Michigan Civil Rights Commission); Minn. Rules Part 5000.340 *et seq.* (1985) (establishing authority of the Minnesota Department of Human Rights); W. Va. Code §§ 5-11-1 *et seq.* (1985) (establishing authority of the West Virginia Human Rights Commission); Wisc. Stat. Ann. §§ 111.31-111.395 (West Supp. 1985) (establishing authority of the Wisconsin State Equal Rights Division and Labor Industry Review Commission).

ARGUMENT

I. THE DISTRICT COURT'S IMPOSITION OF AN INTERIM PROMOTION GOAL IN ACCORDANCE WITH NEGOTIATED CONSENT DECREES WAS FULLY AUTHORIZED BY AND CONSISTENT WITH THE EQUAL PROTECTION COMPONENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. Introduction

This case must be viewed against the background of the longstanding and pervasive history of purposeful racial discrimination practiced by the Alabama Department of Public Safety (herein "DPS") since its creation. Until ordered in 1972 to cease its unconstitutional practices, it simply refused to employ blacks in any sworn position. *See NAACP v. Allen*, 340 F. Supp 703 (M.D. Ala. 1972). After its employment practices were found to violate the equal protection clause of the Fourteenth Amendment, it embarked on a program of resistance which prompted the district court to hold that "the defendants' ha[d] for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." J.A. at 33-34.[3] The district court also found that an unusually high attrition rate among black troopers was the result of the "selection of other than the best qualified blacks from the eligibility rosters, social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing and discipline of blacks harsher than that given whites for similar misconduct while on the force." J.A. at 34.

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[3] J.A. denotes reference to the Joint Appendix of the parties filed with the Court.

B. *The Appropriate Constitutional Standard Of Review Of Affirmative Action Remedies Recognizes The Broad Discretion Accorded Courts and Governmental Bodies To Choose The Means Necessary To Accomplish Compelling Governmental Purposes.*

This Court has already held that the constitution permits government, including the courts, to use race-conscious affirmative measures as one means for achieving the paramount national objective of eradicating racial discrimination and its vestiges. *Local 28 of the Sheet Metal Workers v. E.E.O.C.*, ____*U.S.*____, *106 S. Ct. 3019 (1986); Wygant v. Jackson Board of Education*, ____U.S.____, 106 S. Ct. 1842 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). This Court has subjected the affirmative action plans it has reviewed to searching inquiry, recognizing both the importance of the rights involved and the potential for misuse of racial classifications.

Four members of the Court apply a flexible standard for evaluating the remedial use of race and would uphold the plan if it serves " 'important government objectives' and is 'substantially related to achievement of those objectives.' " *Id.*; *Regents of the University of California v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J. joined by White, Marshall and Blackmun, JJ.); *id.* at 387 (White, J.).[4] These Justices reason that because no fundamental right is involved and because whites have none of the immutable characteristics of a suspect class, "conventional" strict scrutiny is inapplicable. *Wygant*, 106 S.Ct. at 1861 (Citing *Bakke*, 438 U.S. at 357.).

Nevertheless, these Justices eschew the least rigorous "rational basis" standard of review recognizing that "any racial classification is subject to misuse", *Wygant*, 106 S.Ct. at 1861, since such

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[4] Justice Stevens also declines to apply conventional strict scrutiny in reviewing affirmative action remedies, instead focusing on the validity of the race-consciousness, the fairness of the procedures used to adopt and implement the race-conscious action and the nature of the harm to non-minorities. *Wygant*, 106 S.Ct. at 1869 (Stevens, J., dissenting).

classifications can be "inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Bakke*, 438 U.S. at 359 (citing *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (dissenting opinion)). Thus, review under the Fourteenth Amendment, should be "strict and searching" but not "strict in theory and fatal in fact." *Wygant*, 106 S.Ct. at 1861 (citing *Bakke*, 438 U.S. at 362).

Four members of the Court apply strict scrutiny in this context, reasoning that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (Powell J., joined by Burger C. J. and Rehnquist J.); *id.* at 1853 (O'Connor, J. concurring) (adopting Justice Powell's formulation); *see also Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J. concurring); *Bakke*, 438 U.S. at 287-307 (Powell, J.). These members of the Court apply a more restrictive formulation of the standards than Justices Brennan, White, Marshall and Blackmun. "There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* (Citations omitted).

As Justice O'Connor has observed, the disparities among the tests "do not preclude a fair measure of consensus." *Wygant*, 106 S.Ct. at 1853 (O'Connor, J.). "In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' government purpose may be a negligible one." *Id.*

Similarly, in evaluating the means chosen to accomplish the compelling governmental purpose, Justice Powell, author of each of the Court's strict scrutiny affirmative action opinions, has echoed the concern of Justices Brennan, White, Marshall and Blackmun that the Court's review not be "strict in theory but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.). Rather, he has recognized the particularly proximate position of the trial courts and hence the necessity of according them broad

discretion to fashion or approve appropriate affirmative relief for the redress of racial discrimination. *See* below at 15.[5]

Thus as a practical matter the differences between the various "means" tests are not substantial. A majority of the Court accords broad discretion to the district court or governmental body[6] to develop a remedy once a compelling purpose is identified subject only to a limiting "core principle" that such a remedy "not impose disproportionate harm on the interests, or unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 106 S.Ct. at 1853-54 (O'Connor, J.). Because selection of an interim promotion goal here is justified by several compelling governmental purposes and falls well within the permissible range of the district court's discretion, the decision below should be affirmed.

C. The Interim Goal Is Justified By Several Compelling Governmental Interests

1. Remedying Prior Discrimination And Barring Like Discrimination In The Future

It is undisputed that the need to prevent racial discrimination and remedy its effects — a national policy of the "highest priority",

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[5] This Court has long observed this principle in other contexts. As stated by Justice Jackson:

> The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to the exigencies of the particular case.

International Salt Co. v. United States, 332 U.S. 392, 400 (1947) (footnote and citations omitted).

[6] In *Fullilove*, Justice Powell also observed that as with the latitude accorded the trial courts, "Congress possesses a similar degree of discretion to choose a suitable remedy for the redress of racial discrimination." 448 U.S. at 508 (Powell, J.); *see generally*, Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 Va. L. Rev. 1235 (1981).

Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976) — is a constitutionally sufficient predicate for both court-imposed and voluntary affirmative action measures. *See Local 28 Sheet Metal Workers*, 106 S.Ct. at 3053 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 3055 (Powell, J.); *Wygant*, 106 S.Ct. at 1847 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 1854 (O'Connor); *id.* at 1866 (Marshall, J. joined by Brennan and Blackmun JJ.).

The numerous opinions in this case reveal a pattern of longstanding and egregious discrimination affecting all levels of the department and creating barriers to black entry, retention and advancement.[7] As a result in late 1983, nearly twelve years after the DPS had been ordered to cease its unconstitutional discriminatory practices and to take remedial action, it had no blacks in the ranks of major, captain, lieutenant or sergeant but had an aggregate of 131 whites in those ranks. Only four of the 66 corporal positions were occupied by blacks. *Paradise v. Prescott*, 585 F. Supp. 72, 74 (M.D. Ala. 1983). The district court also found that the department sought to frustrate or delay full compliance with its remedial orders. Its non-compliance included a failure to develop job related promotion procedures which did not adversely impact on black candidates. *Paradise v. Prescott*, 580 F. Supp. 171, 173 (M.D. Ala. 1983). Under these circumstances, the district court's selection of an interim promotion goal pursuant to negotiated consent decrees was unquestionably justified by a compelling purpose.

2. *State Governments' Operational Need For Integrated Public Safety Services*

In 1974, the court of appeals recognized in this case the governmental need for an integrated public safety force as an additional

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[7] *See e.g., United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, *NAACP v. Allen*, 493 F.2d 623 (5th Cir. 1974); *NAACP v. Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974); *Paradise v. Shoemaker*, 470 F. Supp. 439 (M.D. Ala. 1979); *Paradise v. Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983); *Paradise v. Prescott*, 585 F. Supp 72 (M.D. Ala. 1983), *aff'd*, *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

purpose served through the imposition of race-conscious goals. It held:

> Finally, but perhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.

NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (quoting *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973)). Thus, just as the "state interest in the promotion of racial diversity has been found sufficiently 'compelling' at least in the context of higher education, to support the use of racial considerations in furthering that interest" *Wygant*, 106 S.Ct. at 1853 (O'Connor, J.), "sound governmental decision making" might in certain circumstances, mandate the conclusion that "an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers." *Id.* at 1867-68 (Stevens, J.).

The compelling operational need for representative minority employment by state and local public safety departments "is not simply that blacks communicate better with blacks" but:

> Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers but on the public's perception of law enforcement officials and institutions.

Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (quoted with

approval by the First Circuit in *Boston Chapter NAACP v. Beecher*, 679 F.2d 965, 977 (1st Cir. 1981), *vacated as moot sub nom., Boston Firefighters Union, Local 718 v. Boston Chapter NAACP*, 461 U.S. 477 (1983) and the Fourth Circuit in *Talbert v. Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 145 (1982)).

The plain reality of this important public purpose in state and local public safety departments has been identified repeatedly by the federal courts as a compelling justification for the use of race-conscious employment remedies.[8] However, recognition of the close correlation between the effective delivery of public safety services and the employment of appropriate numbers of minority public safety officers is not merely a judicial observation nor a recognition of recent vintage. Rather, as summarized by the Sixth Circuit:

> It is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these

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[8] *See e.g. Williams v. Vukovich*, 720 F.2d 909, 923-24 (6th Cir. 1983); *Baker v. City of Detroit*, 483 F. Supp. 930, 996-1000 (E.D. Mich. 1979), *aff'd sub nom., Bratton v. City of Detroit*, 704 F.2d 876 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982), *vacated as moot sub nom., Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 145 (1982); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Doores v. McNamara*, 476 F. Supp. 887, 995 (W.D. Mo. 1979); *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 896-97 (C.D. Cal. 1976).

> reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. *See, To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 830.
>
> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." *Report on the Causes of Crime* 24., National Commission on Law Observance and Enforcement (Vol. I, 1931).

Detroit Police Officers' Ass'n, 608 F.2d at 695.

In addition to these empirical studies, both the Congress and the Federal Law Enforcement Assistance Administration (LEAA) recognize the importance of taking measures to integrate public safety services. In commenting on amendments to extend Title VII coverage to state and local governments the Senate Report observed that:

> The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community but also creates mistrust, alienation and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971) (cited with approval in *Wygant*, 106 S.Ct. at 1855 (O'Connor, J.)). The House Report specifically noted that:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in

> those government activities which are most visible to the minority communities (notably education, law enforcement and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated.

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

The LEAA has similarly concluded "that the full and equal participation of ... minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1982). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race ... [or] color ..., the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1982).

Finally, this critical state public safety concern is not limited to a need for integrated entry-level personnel. As the Sixth Circuit also explained:

> This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:
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> > If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions.

Detroit Police Officers' Ass'n, 608 F.2d at 695. (Citing *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* (1967) at 172). *See also Williams v. Vukovich*, 720 F.2d at 923 (finding a "particularly" great need for integration of the "supervisory ranks"); *Talbert v. Richmond*, 648 F.2d at 923 (finding a "legitimate interest" in the integration of the "top ranks"); *Baker v. City of Detroit*, 483 F. Supp. at 998-1000 (rejecting the claim that the City's operational needs

extended only to black patrolmen and concluding that "[t]he importance of black *lieutenants* in reducing discriminatory practices cannot be overstated.") (Emphasis added). Accordingly, the district court's employment of an interim promotion goal pursuant to the negotiated consent decrees served the compelling operational need for integrated state public safety services.

3. *Compliance With Federal Court Decrees*

In *Local 28 Sheet Metal Workers*, Justice Powell found that in addition to serving the governmental interest in eradicating racial discrimination, some remedial measures there were independently justified by a compelling "societal interest in compliance with the judgments of federal courts." 106 S.Ct. at 3055 (Powell, J.). This interest is implicated here as well.

From the early 1970's onward the defendants have engaged in a pattern of recalcitrance or complacency in the face of the district court's orders and decrees necessitating several separate requests for supplemental relief by the plaintiffs. In 1975 the district court made an explicit finding that the defendants purposefully flouted the district court's 1972 order[9] by artificially restricting the size of the trooper force, using selection methods that arbitrarily excluded large numbers of black applicants and using racially discriminatory practices to create high black attrition from the force.

More specifically, the court fashioned the interim promotion goal challenged here in response to the defendants' complete failure to comply with the 1979 and 1981 consent decrees requiring the development of a promotion procedure which did not adversely impact on black candidates.

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[9] The 1972 order, in turn, as it pertained to supporting personnel, was required due to the defendants' inability to comply with the 1970 order in *United States v. Frazer*. *See NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

D. The Interim Promotion Goal Fell Well Within The Permissible Range of the District Court's Discretion.

The proper constitutional standard of review of race-conscious remedies recognizes the broad discretion accorded district courts to choose or approve the means necessary to accomplish compelling governmental purposes. Where that purpose is remedying racial discrimination this Court has long recognized that the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Similarly, this Court has observed that where unconstitutional race discrimination is involved, the district court must remedy both "the condition that offends the constitution," *Swann v. Charlotte-Mecklenburg Board of Education (Swann I)*, 402 U.S. 1, 15-16 (1971), as well as the conditions found to "flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). The court must take steps to eliminate "all vestiges" of the discrimination "root and branch." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 and n.11 (1973). The remedy must be "feasible", "workable" and "effective", *Swann I*, 402 U.S. at 32, and "promise realistically to work" and "to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968).

Moreover, "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann I*, 402 U.S. at 15. In addition, "all reasonable methods [must] be available to formulate a decree." *North Carolina State Board of Education v. Swann (Swann II)*, 402 U.S. 43, 46 (1971).

Thus, the courts of appeals have often deferred to the district courts' broad remedial discretion in sustaining the propriety of race-conscious measures. As explained by the Third Circuit in upholding an interim hiring goal:

> [P]reservation of the court's flexibility in the framing of remedies would seem to be particularly important in racial discrimination cases since they often require the district court to tailor its order to meet the needs of a highly complex and emotionally charged factual situation.

Erie Human Relations Commission v. Tullio, 493 F.2d 371, 374 (3d Cir. 1974). Similarly, the Fourth Circuit noted that "this broad discretion is mandated by the highly individual nature of the relief needed to remedy discrimination in each particular case." *Chisholm v. United States Postal Service*, 665 F.2d 482, 498-99 (4th Cir. 1981). Thus, the Ninth and Second Circuits have concluded that remedial goals are not "limited to any specific or prescribed form" and can include "specific numbers or ratios" because "[t]he precise method of remedying past discrimination is largely left to the broad discretion of the district judge." *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979) (quoting *Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A.*, 501 F.2d 622, 631 (2d Cir. 1974)).

Furthermore, contrary to the petitioner's suggestion, the district court need not experiment with a shopping list of alternative measures before resorting to remedial goals. *See* Sol. Gen. br. at 18-21. As Justice Powell explained, when reviewing district court use of race-conscious measures "this court has not required remedial plans to be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508. (Powell, J.) Moreover, Justice Powell has observed that the district court "having had the parties before it over a period of time [is] in the best position to judge whether an alternative remedy ... would have been effective." *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J.).

The district court must have an array of tools available to it to enable it to provide effective remedies that are suitable to the circumstances with which it is presented. Authority to order interim promotion goals is one such tool. Surely it is not appropriate to use that tool in every case. In fact, the lower courts have ordered the use of hiring and promotion goals or ratios sparingly. *See* Brief

of The Lawyers' Committee for Civil Rights Under Law filed in No. 84-1999, *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, at p. 7. To assess whether or not a particular race-conscious remedy is appropriate for use in a given case, the Court has examined a variety of factors. Those include: (1) necessity; (2) flexibility; (3) duration; (4) burden on non-minorities and (5) relationship to the relevant minority labor market or population. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3051-3053 (Brennan, J. joined by Marshall, Blackmun and Stevens JJ.); *id* at 3055 (Powell, J.); *id.* at 3060-3062 (O'Connor, J.); *id* at 3062 (White, J.); *Wygant*, 106 S. Ct. at 1850-52 (Powell, J. joined by Burger C.J. and Rehnquist, J.); *id.* at 1857 (O'Connor).

As we show below, the interim promotion goal ordered here falls well within the permissible range of the district court's authority under the facts of this case, and the judgment below must therefore be affirmed.

1. Necessity

Evaluation of the necessity of race-conscious relief requires consideration of the purpose served by the remedy, the scope and extent of the defendants' discriminatory practices and their effects and the efficacy of alternative remedies and their relative burdens.[*] *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3051; *id.* at 3055 (Powell, J.). All of these considerations support the propriety of the interim promotion goal.

The district court charged with the responsibility of developing a promotion procedure pursuant to the consent decrees was well aware of the defendants' "long term, open and pervasive" discrimination, the resulting virtual exclusion of blacks from the DPS's upper ranks and the failure of all remedies other than interim and long term hiring goals in providing any significant degree of progress in remedying this discrimination at the lower

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[*] Consideration of the efficacy of alternative remedies does not require the district court to impose the least restrictive remedy. *Compare Local 28 Sheet Metal Workers*, at 3055 (Powell, J.) *with Fullilove*, 448 U.S. at 508 (Powell, J.).

levels of the force. *Paradise v. Prescott*, 585 F. Supp. at 75-76.[8] Indeed, in drafting the promotion goal, the district court specifically relied on an earlier order in which its review of this case's history "demonstrated dramatically" the efficacy of race-conscious measures over other relief. *Id.* at n.3. (citing *NAACP v. Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974)).

In the *Dothard* opinion, the district court had compared, as to the hiring of clerical personnel, the virtual "non-existent" progress of non-goal measures in *Frazer* with the significant progress achieved through the hiring goals in *Allen* and concluded that without goals "effective relief will not be achieved." *Id.* at 507. These observations spurred the Fifth Circuit's commendation of the "unusual confirmation of the feasibility, wisdom and efficacy of the decree." *NAACP v. Allen*, 493 F.2d at 621. Accordingly, the district court's conclusion that the "egregious" imbalances in the DPS's upper ranks would not "dissipate within the near future" without race-conscious action, 585 F. Supp. at 75, cannot seriously be questioned.

Apart from its stated remedial purpose, the district court also sought to encourage the DPS's prompt development of a non-discriminatory promotion procedure to avert the disparate consequences of other selection methods. *See id.* Under these circumstances, the use of interim promotion goals is plainly appropriate. As explained by the plurality in *Local 28 Sheet Metal Workers*:

> [A] district court may find it necessary to order interim hiring or promotion goals pending development of non-discriminatory hiring or promotion procedures. In these cases, the use of numerical goals provide a compromise

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[8] In construing a consent order for enforcement purposes, this Court has required that the district court look to "the circumstances surrounding the order and the context in which the parties were operating." *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 243 (1975).

> between two unacceptable alternatives: an outright ban on hiring or promotions or continued use of a discriminatory selection procedure.

106 S. Ct. at 3037 (Brennan J., joined by Marshall, Blackmun and Stevens, JJ.).

Finally, the petitioner viewing the interim promotion goal solely as an "*in terrorem*" enforcement device and ignoring its other purposes, suggests that the district court should have chosen other remedies. Sol. Gen. br. at 19-21. For example, petitioner asserts that the court could have made promotion decisions itself, appointed a trustee to supervise the DPS's progress or imposed heavy fines and fees. Sol. Gen. br. at 21.

Even viewing the interim promotion goal in the limited manner suggested by petitioner, the alternative remedies offered are neither equally effective nor less burdensome. Since use of the interim promotion goal compelled within seven months, *see* J.A. at 142-145, what the DPS had been unwilling to do in close to five years, it is difficult to imagine how the other suggested approaches could have been as effective. Moreover, the petitioner's suggested remedies fail to take into account the burdens on the "interests of state and local authorities in managing their own affairs", *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), and the express congressional recognition in section 706(g) of Title VII of the propriety of leaving the details of individual employment decisions to employers notwithstanding the use of class-based race-conscious measures. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3035, (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 3059-60 (O'Connor, J.) ("[A]s to any racial goal ordered by a court as a remedy for past discrimination, the employer *always* has a potential defense by virtue of § 706(g) against a claim that it was required to hire an employee that the employee was not hired for reasons unrelated to discrimination.") (Emphasis in original).[a]

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[a] Attorneys fees and costs have been awarded on numerous occasions in this case and have not produced any noticeable effect on the DPS's black supervisory composition. *See e.g.*, 317 F. Supp. at 1093; 340 F. Supp. at 708-10.

2. *Flexibility*

The interim promotion goal is flexible. It neither requires nor permits the promotion of unqualified persons. Moreover, the goal does not require hiring unneeded employees or displacing existing employees. *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3061 (O'Connor, J.); *id.* at 3062-63 (White, J.).

Thus, it accommodates legitimate reasons for non-compliance, such as the lack of qualified applicants or declining economic conditions, and it does not impose sanctions on the employer despite good faith efforts to comply. *Compare id.* at 3051 (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.) *and id.* at 3056 (Powell, J.) *with id.* at 3061-62 (O'Connor, J) *and id.* at 3062-63 (White, J.). Accordingly, even evaluated under the strictest standards of flexibility utilized by some members of the Court in the more limited context of a court's Title VII remedial authority, the goal has none of the attributes of a rigid quota. *See id.* at 3060-62 (O'Connor, J), *id.* 3062-63 (White, J.).

3. *Duration*

The interim promotion goal is temporary both in letter and application. As drafted, the interim goal applied only until either a non-discriminatory promotion procedure was developed or until 25% of each of the higher ranks were comprised of black officers. In application, it was only used once — at the corporal level — and it resulted in the promotions of only eight black troopers. *See Paradise v. Prescott*, 767 F.2d at 1524. Accordingly, the interim goal has operated as a limited and "temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance." *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3052 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); *see also, id.* at 3056 (Powell, J.).

4. *Burden on Non-Minorities*

"[A]s part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some

of the burden of the remedy." *Wygant*, 106 S. Ct. at 1852 (Powell, J., joined by Burger, C.J. and Rehnquist, J.). Members of this Court have repeatedly recognized that "such a sharing of the burden is not impermissible." *Id.*; *Fullilove*, 448 U.S. at 484 (Burger C.J., joined by White and Powell, JJ.); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976). Because the "actual burden [if any] shouldered by non-minoriti[es] ... is relatively light", *Fullilove*, 448 U.S. at 484, and "will have only a marginal impact on the interests of white workers" *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3054, the interim promotion goal is plainly appropriate.

First, as discussed above, the temporary and extremely limited nature of the goal substantially restricts its potential burden. It has been used only once, only for corporal promotions and only eight black officers received promotions as a result of its operation.[13]

Second, the interim goal is not an "absolute bar to white advancement." See *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3052; *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). Even in the one instance where the interim goal was employed, half of those promoted were white.

Third, the interim goal does not require the discharge of white employees. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3057 (Powell, J.); *Weber*, 443 U.S. at 208. It merely delays promotions to persons who otherwise would have received them if the DPS's discriminatory selection process had been followed strictly. As explained by Justice Powell, "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant*, 106 S. Ct. at 1851. Whereas layoffs might in certain circumstances "impose the entire burden of achieving racial equality on particular individuals resulting in serious disruption of their lives" *id.*, promotion goals, like hiring goals, "impose only a diffuse

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[13] Because of its narrow scope and limited application, the interim goal does not present the prospect of widespread "leap frogging [of] minorities over senior and better qualified whites." *See Local 93 International Firefighters, 106 S. Ct. at 3082 (White , J., dissenting).*

burden, often foreclosing only one of several opportunities." *See id.* Thus, unlike the permanent debilitating disruption of a layoff, white candidates denied promotion by the extremely limited application of the interim goal, may simply reapply for future positions.

Fourth, any actual burden on non-minority expectations must be tempered by recognition that such expectations have been artificially inflated by the blatant discriminatory practices which the lower courts here have condemned. Thus, just as "some non-minority business may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities", *Fullilove*, 448 U.S. at 484-85 (Burger, C.J. joined by White and Powell, JJ.), "where an employer has violated an anti-discrimination law, the expectations of non-minority workers are themselves products of discrimination and hence 'tainted' and therefore more easily upset." *Bakke*, 438 U.S. at 365 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

Presumably, many white promotional candidates have reaped some competitive benefits from the DPS's pre and post 1972 discriminatory practices, and the continuing frustration of the district court's order leading to the 1975 order, the 1979 and 1981 consent decrees and the 1983 enforcement proceedings. Indeed, at the time of the enforcement proceedings leading to the 1983 order at issue here, virtually all promotions to the rank of corporal had been awarded to white officers and no white officers had ever had to compete with a black candidate for a promotion. As observed by the district court "the department *still* operate[d] an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons." 585 F. Supp. at 74. (Emphasis in original).

Finally, the intervenors' individual claims of entitlement based on higher standing on the eligibility ranking J.A. at 67-85 — as with the identical claims of white trooper applicants rejected 12 years ago — are neither novel nor persuasive. As the Fifth Circuit explained in 1974:

> [N]o applicant for public employment can base any claim of right under the Fourteenth Amendment's

> equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such criteria have not been shown to be predictive of successful job performance. Hence there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected.

493 F.2d at 618.

Accordingly, in light of its minimal burden on non-minority interests and expectations, the interim promotion goal neither "impose[d] disproportionate harm on the interests, [n]or unnecessarily trammel[led] the rights of innocent individuals" *Wygant*, 106 S. Ct. at 1853-54 (O'Connor, J.), and thus withstands constitutional scrutiny.

5. Relationship to Relevant Minority Labor Market

The remedy selected by the district court pursuant to the consent decrees contains both a long term or end goal and an entrance or interim goal. *See generally United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980). The long term or end goal is 25% and reflects the relevant black population.[14] The interim goal of promoting one black for each white promoted merely measures the speed of progress towards the end goal, much in the manner of an end date. *Cf. Local 28 Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J.).[15] Plainly, regulation of the speed

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[14] Although the intervenors now question the propriety and correctness of the 25% labor market end goal, IV Br. at 13-14, this issue was neither raised below nor in the petition for certiorari and is thus not properly before this Court. *See Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1969) (The Court will "not ordinarily consider" issues neither raised nor considered before the court of appeals); *Irvine v. California*, 347 U.S. 128, 129-30 (1953) (The Court should not consider additional questions not raised in the petition for certiorari).

[15] As with the end date in *Local 28 Sheet Metal Workers*, there is no reason to assume that the interim goal will be applied inflexibly if invoked in the future. *See* 106 S. Ct. at 3051 (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.); *id* at 3056 (Powell, J.). Moreover, as discussed above at 19, the interim goal is crafted in a particularly flexible manner.

of remedial measures is a matter appropriately committed to the sound discretion of the district court which is best aware of the surrounding circumstances and the parties' history. Indeed, this Court as well as numerous courts of appeals have recognized the discretionary nature of the choice of interim or entrance goals and have approved interim goals which exceed the labor market end goal or percentage, *see e.g. Weber*, 443 U.S. at 199 (50% interim goal, 39% labor market end goal); *United States v. City of Buffalo*, 633 F.2d at 646-47 (50% interim goal, 22% labor market percentage), those which equal the end goal, *see e.g. Bratton*, 704 F.2d at 893-97 (50% interim goal, 50% labor market end goal) and those which are exceeded by labor market percentages, *see e.g. Vulcan Society of New York City Fire Dept. Inc. v. Civil Service Comm'n*, 490 F.2d 387, 398-99 (2d Cir. 1973) (25% interim goal, 32% labor market percentage).[18]

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[18] Here, the district court exercised its discretion wisely as to the first fifteen corporal openings, considering both a lesser one-shot proposal to promote four blacks and eleven whites, J.A. at 125-26, and the possibility of greater measures such as promoting blacks to all fifteen positions followed by the one-to-one promotion goal "[i]n light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances" 585 F. Supp. at 75 n.1. The court wisely arrived at an intermediate figure directing the promotion of eight blacks and eight whites pursuant to the interim procedure. *See* 767 F.2d at 1524.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Dated: New York, New York
September 30, 1986

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FOR ARGUMENT

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No. 85-999

IN THE

Supreme Court Of The United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner

v.

PHILLIP PARADISE, JR., et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The City of Birmingham, Alabama submits this brief *Amicus Curiae* pursuant to United States Supreme Court Rule 36.4.

Interest of the Amicus Curiae

The City of Birmingham is well suited to assess the arguments presented in this case. Unlike the historic discrimination in the Alabama Department of Public Safety (hereinafter referred to as "Alabama DPS"), Birmingham's past ignoble history in race relations is well known. Further, the City's awakening to its obligations of non-discrimination was brought about only through prodding by the federal government and by extensive litigation. Recently, however, Birmingham has changed both racial attitudes and stratified municipal employment patterns. Birmingham's progress, in large part, is attributable to the successful implementation of affirmative action goals in employment. Significantly, the City of Birmingham has recognized that its earlier grudging acceptance of affirmative action was misplaced pessimism. Through the growing representation of blacks in its municipal departments, those departments — especially fire and police — are better able to serve and protect all citizens of Birmingham in every neighborhood and community in the City.

Birmingham, like Alabama DPS, agreed in a conscientiously constructed consent decree (hereinafter referred to as "Birmingham Decree" and "Alabama DPS Decree," respectively) to race conscious affirmative action designed to remedy the pernicious effects of past discrimination against blacks. Like the Alabama DPS Decree, the Birmingham Decree has been challenged by white employees who, to a degree, are the certain beneficiaries of the City's past discriminatory policies.

In 1974, several blacks and an area NAACP chapter brought employment discrimination lawsuits against the Jefferson County Personnel Board (the local civil service system) and the City of Birmingham under Title VII of the Civil Rights Act of 1964, as amended. Subsequently, the Department of Justice also filed a Title VII pattern and practice action against

the City, other municipalities, and other governmental entities, charging them with pervasive race and sex discrimination in employment. The cases were consolidated in federal district court in Birmingham. Over the course of approximately seven years, some issues – involving applicant testing for entry level police and fire department jobs – were tried to conclusion; other issues were extensively prepared for litigation.

Prior to settlement of the actions, some of the issues pertaining to municipal employment were litigated in two separate trials. In 1977, the trial court ruled that tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. That decision was affirmed on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels,* 616 F.2d 812 (5th Cir), *cert. denied,* 449 U.S. 1061 (1980). In a second trial in 1979, other employment tests, qualifications and practices were challenged. Finally, with the active participation of the Department of Justice, all parties – the City, the Department of Justice, and the private plaintiffs – entered into negotiations to settle the lawsuits. Prior to an announcement of the decision of the 1979 trial, negotiations yielded a Court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Birmingham Decree includes an affirmative action program, the long-term goal of which is to remedy past discriminatory policies and to achieve a municipal work force whose percentages of whites, blacks and women are in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The Decree also provides interim goals that requires the City to use good faith in seeking to hire and promote qualified blacks and women, where available, to City jobs at rates from fifteen percent (15%) to thirty percent (30%) annually for women and that range from thirty-three percent (33%) to fifty percent (50%) annually for blacks. For the past four years, the City has complied with the Consent Decree goals to the extent that persons qualified for hiring or promotion were available. Because the Birmingham

Decree had goals – and not quotas – the City has never been compelled to hire or promote (and has never hired or promoted) any individual who was not qualified for a position.

In 1984 (ten years after the first suit against Birmingham was brought and three years after that litigation was settled by entry of the Consent Decree), Birmingham was sued, in several lawsuits, for alleged reverse discrimination by whites who charged that the Birmingham Decree, and Birmingham's implementation of that Decree, unlawfully deprived them of employment opportunities. Much to the surprise of Birmingham, the Justice Department intervened in vigorous support of the whites and challenged the City's implementation of the Birmingham Decree. In December of 1985, after a full trial in three consolidated actions pertaining to two of the City's departments, the district court rejected the claims of reverse discrimination, finding, *inter alia,* that although Birmingham considered race and sex in promotions, it did so pursuant to a valid consent decree. *In re: Birmingham Reverse Discrimination Employment Litigation*; 39 FEP Cases 1431 (BNA) (N.D. Ala. 1985). In upholding the lawfulness of the Consent Decree, the district court followed the precedent of the Eleventh Circuit Court of Appeals which upholds race-conscious remedies that benefit persons not shown to be victims of discrimination, when the remedies are not imposed under circumstances that existed in *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984), and otherwise comport with the guidance provided in *United Steelworkers v. Weber,* 443 U.S. 193 (1979). *Paradise v. Prescott,* 767 F.2d 1514 (11th Cir. 1985).

The results of the hiring and promotion goals in the Birmingham Decree are clear. The City of Birmingham is finally developing a municipal work force, particularly a police force and fire department, that reflects Birmingham's multiracial community. This reflection of Birmingham's pluralism gives municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham and allows the City of Birming-

ham to render the quality of services that are necessary to serve the entire community. For example, the Birmingham Police Department currently has about one and one half times more blacks employed than at the time of the entry of the Decree. The number of black police sergeants has increased from *three* in 1981 to twenty-four in 1986. The number of black police lieutenants has increased from *zero* to three. The number of black police captains has increased from zero to two (promoted in last two years).

In the Birmingham Fire and Rescue Service, the number of blacks has almost doubled since the signing of the Decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and two captains who are black. At the time of the Decree, there were no blacks employed above the entry level rank of firefighter.

The twenty percent (20%) black representation in the Birmingham Police Department and the twelve percent (12%) black representation in the Birmingham Fire & Rescue Service remain modest percentages for a city whose black population exceeds fifty percent (50%). But even those modest advances are almost entirely attributable to the employment goals and timetables which the Birmingham Decree directs the City of Birmingham to follow.

The issues in *United States v. Paradise* are, therefore, of vital interest to the City of Birmingham for a variety of reasons. First, this Court's ruling may affect the appeal now pending in the Eleventh Circuit Court of Appeals in the Birmingham Reverse Discrimination Litigation, as well as affect the outcome of two other reverse discrimination actions evolving from the Consent Decree promotions pending against the City of Birmingham in the trial court. Second, this Court's ruling may determine whether the Birmingham Decree, signed by Birmingham with the intent of putting behind it the many years of discriminatory employment practices, of rectifying the consequences of those practices, and of ending interminable litigation, will in fact have those intended effects. Third, this Court's ruling will amplify the teachings of the affirmative ac-

tion decisions of the 1985-1986 Term which reinforced the continued validity of affirmative action.

SUMMARY OF THE ARGUMENT

The United States Department of Justice has for years advocated and obtained court-ordered race-conscious and gender-conscious remedies in employment discrimination litigation without violating the Equal Protection Clause. The Department sought, authored and obtained such a decree in litigation with Amicus, the City of Birmingham, as well as with other jurisdictions and private employers across the country. The Department consistently contended in those actions that such remedies are constitutional as well as necessary to effectuate the purposes of Title VII.

The government argued in support of the lawfulness of and need for numerical race-conscious goals to this Honorable Court in the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In defending the lawfulness of such remedies, the government expressly contended that goals may benefit an entire class, even to the detriment of another class. The government's historical position in support of the precise kinds of numerical hiring and promotion goals contained in the Decree now before this Court, not its recent abandonment of that position, is entitled to considerable deference. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977). Indeed, the traditional position is the legally correct position.

Race and gender conscious remedies do not violate the Equal Protection provisions of the 5th and 14th Amendments. As this Court stated in the last term, "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 12 (May 19, 1986). Such remedies are not unfair to non-minorities even if they benefit individuals not shown to have been victims of discrimination. Guidance provided by this Court in its previous decisions, including *United Steel-*

workers v. Weber and *Wygant v. Board of Education, supra,* assures that non-minorities do not unfairly bear the burdens of the affirmative action goals in a manner that would violate the Equal Protection Clause because such goals must be "narrawly tailored."

Further, the experience of the City of Birmingham and the Alabama DPS demonstrates that the numerical goals contained in their consent decrees were necessary to achieve meaningful employment and promotion opportunities for minorities in Alabama. *Amicus'* experience has also demonstrated that this achievement has not occurred at the expense of non-minorities. For example, most of the white plaintiffs in the Birmingham litigation have been promoted to the positions which they sought, and the delays in promotion have generally been approximately one year after the date on which the plaintiffs became eligible for (not entitled to) a promotion.

Finally, the experience of *Amicus* demonstrates the crucial need for an employer, particularly a public employer with finite resources, to be able to settle employment discrimination litigation on a basis that is fair to its employees, minorities and non-minorities alike, and that also relieves the employer of unwilling and costly participation in protracted litigation. The Consent Decrees signed by *Amicus* and by the Alabama DPS are such decrees and do not impose unconstitutional burdens on non-minorities.

ARGUMENT

I. The United States Department of Justice Had For Years Advocated Numerically Based Race-Conscious, Hiring and Promotion Goals as Lawful and Necessary

A. *The United States Obtained Numerically Based Race-Conscious Hiring and Promotion Goals with Birmingham*

The hidden agenda of the government — its plan to persuade courts to adopt as law the Department's abdication of affirmative action — is not immediately apparent from the govern-

ment's briefs in this pending case, but is abundantly clear from actions taken by the government in the Birmingham Reverse Discrimination Litigation. In the Birmingham cases, the government advocated and obtained the imposition of numerically based gender and race-conscious goals, remedies considered by all parties and the court as plainly lawful, and vowed to defend the Decree against collateral attack. However, since the change of administration at the Justice Department, the government has led the attack on the Decree by proffering a convoluted and strained construction of the Birmingham Decree that is plainly contrary to its express wording and the parties' intentions.

The Birmingham Decree contains gender-specific hiring and promotion goals that permit, and indeed compel, Birmingham to hire and promote qualified minorities in preference to non-minorities. For example, the interim relief provided in the Birmingham Decree requires the City to fill fifty percent (50%) of certain vacancies in the police and fire departments with blacks who are qualified and available for employment and to promote qualified blacks to subsequent vacancies in higher level positions at twice the percentage of blacks in the positions from which promotions are traditionally made.[1] While the Decree does not compel Birmingham to hire or promote an unqualified or less qualified minority in preference to a person who is "demonstrably better qualified based on the results of a job related selection procedure,"[2] it does not otherwise permit Birmingham to prefer a qualified white male over a qualified, but arguably less qualified, minority if doing so would prevent Birmingham from meeting prescribed hiring or promotional ratios. The Decree, therefore, contemplates that in some instances whites who are qualified for employment will be passed

[1]Other similar percentages and ratios are prescribed for female promotions and for blacks and females hired into entry-level jobs.

[2]Paragraph 2 of the decree reads, in pertinent part: "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure."

over by blacks who are at least minimally qualified for promotion.

At the hearing held in 1981 to determine the fairness of the proposed Birmingham Decree, this matter was directly addressed when the Decree was explained as requiring preferential treatment of qualified minorities over more qualified nonminorities. The government unequivocably represented this feature of the Decree to be lawful.[8] When the Decree was challenged in court by white employees of the City Engineering Department, the Justice Department filed, on October 12, 1982, a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. The Justice Department maintained that the white plaintiffs' action "constitute[d] an impermissible collateral attack on the lawfully entered Consent Decrees" entered into by the United States and the City of Birmingham and the Jefferson County Personnel Board. United States' Motion to Dismiss or Alternatively Motion for Summary Judgment, *Birmingham Association of City Employees v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed Oct. 12, 1982) (later consolidated with other actions *In re: Birmingham Reverse Discrimination Employment Litigation, supra*).

Two years later, however, the Justice Department made known its intention to intervene in reverse discrimination lawsuits as a party plaintiff against the City of Birmingham thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Birmingham Decree. Paradoxically, however, despite its stated intention to intervene as a party plaintiff and contest promotions made pursuant to the Decree's goals, the Justice Department also vowed that the United States intended "vigorously to defend the validity of those Consent Decrees and to defend the validity of any remedial measures re-

[8]The Justice Department's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful, that they do not unlawfully discriminate against whites." *Id.* at 40.

quired by those Consent Decrees." Hearing *Wilks v. Arrington*, No. CV-83-AR-2116-S and *Zannis v. Arrington*, No. CV-83-AR-2480-S (N.D. Ala. Feb. 28, 1984) (later consolidated with other actions. *In re: Birmingham Reverse Discrimination Employment Litigation, supra*) at 29. The City of Birmingham continues to be perplexed by the Justice Department's contradictions.

Even now, after years of litigation, after a trial, and after a judgment for the City of Birmingham, the City remains confused by the Justice Department's interpretation of the Birmingham Decree, which requires the Department to defend the Decree against collateral attack. The Department's contradictory intervention on behalf of white plaintiffs coupled with its cynical vow to defend the Decree according to the dictates of paragraph 3 still astonish the City of Birmingham. The present view of the government is a repudiation of its long-time role in securing compliance with Title VII through goals and timetables. This view does not represent a colorable reconsideration of statutory construction or of the intent of Congress when Title VII was enacted, but rather represents nothing more than the political stance of the current Justice Department.

In inviting this Court to accept its narrow view of permissible remedies under the United States Constitution, the government implicitly suggests that its present interpretation of the Constitution is the Department's long-standing interpretation. However, for years (and as recently as August, 1981, when the Birmingham Decree was entered), the Justice Department actively sought, obtained and defended the remedies it now contends are unlawful.

The Birmingham litigation is just one of dozens of similar actions across the country in which the government obtained numerical race-conscious remedies of the kind imposed in the cases now before this Court. Indeed, the Civil Rights Commission in 1972 credited the Civil Rights Division of the Justice Department for having brought or participated as "the Amicus in the cases resulting in landmark decisions sustaining

the use of numerical goals and timetables as a remedy for past discrimination." 1972 Civil Rights Commission Report 277 n. 76. *See, e.g., United States v. Local 86, Ironmakers,* 443 F.2d 544, 553 (9th Cir. 1971). This historical role of the government reflects an interpretation that warrants the deference normally accorded a governmental agency charged with the statutes' enforcement. *Nashville Gas Co. v. Satty,* 434 U.S. at 142 n. 4.

B. *The United States Advocated Numerical Remedies As Lawful and Necessary Before This Honorable Court*

Just as the United States, by way of hindsight, developed a strained interpretation of the Birmingham Decree which differed from the government's interpretation at the time of signing, the United States has recently developed and is now proposing to this Court a view of Title VII and of Congressional intent that differs from the position it previously took in this Court.

In its brief before this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), the government painstakingly explained that numerical race-conscious remedies were both lawful and necessary. While *Weber* involved a voluntary affirmative action plan, as opposed to one imposed by a court, the government in *Weber* did not confine its defense of affirmative action to such voluntary plans. In 1979 the government represented to this Court:

> The legislative history of Title VII establishes that *numerical race-conscious measures,* such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation.

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of America v. Weber,* (Jan. 30, 1979) (hereinafter "U.S.A./E.E.O.C. *Weber* brief") at 18-19. (Emphasis added). Noting that consent de-

crees "commonly contain affirmative action obligations, including goals and timetables" and that the validity of such decrees is "not undermined by disclaimers of past discrimination," the government insisted in its *Weber* brief that affirmative action could include numerical goals.

In 1979, the government understood Title VII's legislative history as permitting race-conscious goals and Section 706 (g) as not intended to prohibit numerical remedies. The government explained that the concern raised by *some* Congressmen that the Act would require the use of quota systems led to assurances by the Act's sponsors that the Act did not require employers to maintain racially balanced work forces. These assurances, however, "did not suggest restrictions on remedies that could be ordered after a finding of discrimination." U.S.A./E.E.O.C. *Weber* brief at 29. Rather, Congress intended to preserve management prerogatives to the fullest extent possible, *in the absence of discrimination*. As explained by the government in 1979, "the last sentence of Section 706 (g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act" and "did not in any way restrict the scope of the remedies [such as race-conscious numerical goals] that could be ordered for the kinds of discrimination prohibited by the Act." U.S.A./E.E.O.C. *Weber* brief at 30-31.

The government's extensive review of the legislative history of the 1972 amendments to Title VII led it to conclude, in 1979, that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972. . . ." U.S.A./E.E.O.C. *Weber* brief at 31. As noted by the government, Congress in 1972 was aware of the numerous court decisions ordering or upholding numerical relief as a remedy for violations of Title VII, and expressly stated its intent, in the Act's section-by-section analysis, to continue that case law. U.S.A./E.E.O.C. *Weber* brief at 32-33, 34 n. 17 (citing such cases in 5th, 7th, 8th and 9th circuits and citing S. Rep. No.

92-415, 92d Cong., 1st Sess. at 21, 27-28 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 8, 13 (1971); 118 Cong. Rec. 1664-1676, (1972)).

Senator Javits opposed a proposed amendment to restrict federal agencies from ordering the use of numerical ratios in hiring, arguing that such a restriction "would deprive the courts of the opportunity to order affirmative action under Title VII . . . in order to correct a history of unjust and illegal discrimination . . ." and "would torpedo orders of courts seeking to correct a history of unjust discrimination . . . because it would prevent the court from ordering *specific measures* which would assign specific percentages of minorities that had to be hired. . . ." *Id.* at 1665, 1667, cited in U.S.A./E.E.O.C. *Weber* brief at 33-34. (Emphasis added). The government further noted that the other co-floor leader, Senator Williams, also opposed any prohibition of numerical relief because such a prohibition "would strip Title VII . . . of all its basic fiber." 118 Cong. Rec. 1676 (1972) (cited in U.S.A./E.E.O.C. *Weber* brief at 34).

According to the government, these views "prevailed in the Senate" and "were shared by the House."

> In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that *numerical, race-conscious* relief is available under Title VII to remedy employment discrimination.

U.S.A./E.E.O.C. *Weber* brief at 35. (Emphasis added).

The government's long-standing construction of Title VII as permitting a court to impose race-conscious remedies, evidenced by its securing such relief in countless actions, including Birmingham's litigation, and by its brief in *Weber*, is entitled to considerable deference. The government's recently-contrived construction of legislative history is nothing more than a re-

trenchment motivated by its present policies that are antagonistic to the purpose and intent of Title VII.

Unless this Honorable Court reaffirms its approval of affirmative action as approved in *Weber*, and explicitly approves the actions of its lower courts in imposing numerical race-conscious remedies where necessary to remedy past discrimination, it will send a fateful message to the government and to individuals who are, or may be, subject to discrimination. That message will sound the death knell of Title VII in all but the most narrow of circumstances, as it would encourage the government to dismantle all progress gained through years of vigorous enforcement of Title VII.

II. The Court's Equal Protection Analysis Would Allow For One-To-One Promotions

A. *All Analyses Depend on the Severity of the Wrong to be Corrected*

This Court has consistently "recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Sheet Metal Workers v. EEOC*, No. 84-1656, slip op. at 54; *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 6; *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *University of California Regents v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court has not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. *See Wygant, supra*, at 5 (opinion of Powell, J.) (Means chosen must be "narrowly tailored" to achieve "compelling government interests"); *id.*, at 1 (O'Connor, J., concurring); *id.*, at 7 (Marshall, J., dissenting); *id.*, at 8 (Stephens, J., dissenting) (Public interest served by racial classification and means pursued justify adverse effects on the disadvantaged group); *Fullilove, supra*, at 491 (opinion of Burger, C. J.) (racial preference subject to "a most searching examination"); *id.*, at 519 (Marshall, J., concurring in the judgment) (remedial use of race

must be substantially related to achievement of important governmental objectives); *Sheet Metal Workers v. EEOC*, slip op. at 54-55.

In the case at bar, the district court's one-to-one promotion remedy satisfies any of the Supreme Court's yardsticks for measuring appropriate race conscious remedial measures. As this court noted in *Sheet Metal Workers v. EEOC*, "a court may have to resort to race-conscious affirmative action when confronted with an employer or labor union that is engaged in persistent or egregious discrimination. Or, such relief may be necessary to dissipate the lingering effects of pervasive discrimination." *Sheet Metal Workers v. EEOC*, slip op. at p. 50. The discrimination practiced by the Alabama Department of Public Safety, even after the 1972 court order, at best, illustrates "the lingering effects of pervasive discrimination;" more likely, and more realistically, the employment figures of the Alabama Department of Public Safety show "persistent or egregious discrimination," justifying race-conscious affirmative action.

Even under this Court's strict scrutiny analysis, the one-to-one promotions in the case at bar are a reasonable remedy, given the evidence of prior discrimination. A district court must have the flexibility to order all remedies necessary to correct constitutional violations – particularly violations as egregious as those in the Alabama Department of Public Safety and the City of Birmingham.

The Supreme Court has long recognized that

> [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-

330 (1944)). "It is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann, supra,* 402 U.S. at 16. This Court has also noted the importance of judging the significance of the constitutional violation, and tailoring the remedy to fit the violation. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'." *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1984) (quoting *Milliken v. Bradley,* 418 U.S. 717, 744 (1974)). Thus, this Court must consider the extent to which the Alabama Department of Public Safety discriminated against blacks in employment.

Even the United States, in its brief in *Johnson v. Transportation Agency, Santa Clara County,* 85-1129 (October Term 1986), admits:

> One cannot know what is necessary as a remedy until one develops a concept of the wrong to be corrected. While mathematical precision may not be possible in such matters, it is possible generally to direct remedies at identified areas of discrimination, and to shape them in a way *commensurate with the duration and pervasiveness of discrimination.*

U.S. Brief at p. 21. (Emphasis added).

The City of Birmingham supports Respondent in this action and maintains that the one-to-one promotion ordered by the District Court in 1983 does not violate the Equal Protection Clause by classifying impermissibly along racial lines. *Amicus* maintains that the one-to-one promotions, while not a necessary remedy for employment discrimination violations, is absolutely essential to overcome the pernicious effects of deeply rooted employment discrimination in the Alabama Department of Public Safety.

This Court's equal protection analysis of racial classifications follows a two-pronged test. Under the most stringent analysis, the Court must first find that the racial classification "must be justified by a compelling governmental interest." *Wygant v. Jackson Board of Education,* No. 84-1340, slip op. at 5 (May

19, 1986); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Second, the means chosen "must be narrowly tailored to the achievement of that goal." *Id.* at 5; *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980).

The existence of societal discrimination alone is not a sufficiently compelling governmental interest to justify a racial classification. "Rather, the [Supreme] Court has insisted upon *some showing* of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, slip op. at 6. (Emphasis added). Such a showing of prior discrimination may be made in several ways. For example, this Court has held that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern of [sic] practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (quoting *Teamsters v. United States*, 437 U.S. 324, 339 (1977)). Consequently, the *Wygant* Court concluded that "*Hazelwood* demonstrates this Court's focus on *prior discrimination* as the justification for, and the limitation on, a state's adoption of race based remedies." *Wygant*, slip op. at 6. (Emphasis added).

B. *Discrimination Against Blacks in Alabama Has Been Notorious*

As this Court well knows, the history of discrimination against blacks in the State of Alabama is deeply rooted and has permeated the social fabric of society. Employment patterns, along racial lines are the product of the social fabric. Federal court cases coming out of Alabama have played a prominent and distinctive role in overcoming such deep-seated segregation. Based on the cases that have come to this Court from Alabama courts, the Supreme Court should well understand that strong efforts were necessary to overcome both *dejure* and *de facto* segregation in Alabama. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (City parade permit ordinance poses unconstitutional restraint on First Amendment rights of Civil Rights

demonstrators); *Lee v. Washington,* 390 U.S. 333 (1968) (Alabama statute requiring segregation in jails and prisons ruled unconstitutional); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (Title II of The Civil Rights Act of 1964, forbidding racial discrimination by restaurants serving interstate travelers, is a constitutional exercise of the Commerce Clause); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (Gerrymandered voting districts are an unconstitutional infringement on blacks' right to vote); *NAACP v. Alabama,* 357 U.S. 449 (1958) (NAACP protected from disclosing names and addresses of its members based on Fourteenth Amendment right of members to pursue private interests and to associate with others); *Norris v. Alabama,* 294 U.S. 587 (1932) (Exclusion of blacks from grand jury is ruled unconstitutional as a violation of the 14th Amendment).

In addition, the Eleventh Circuit Court of Appeals has, on many occasions, addressed pervasive and notorious racial discrimination in employment in Alabama. Successful employment discrimination lawsuits have been instituted in recent years against major industries in the State: *e.g. Pullman Standard v. Swint,* 456 U.S. 273 (1982); *James v. Stockham Valve Co.,* 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *U.S. v. Allegheny-Ludlum Industries,* 546 F.2d 1249 (5th Cir. 1977); *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977); *U.S. v. Hayes International Corp.,* 456 F.2d 112 (5th Cir. 1972).

The state government and its agencies, such as the Alabama Department of Public Safety, as well as Alabama municipalities, including the City of Birmingham, did little to overcome years of official discrimination against blacks. To the contrary, most governmental units within the State took action to preserve segregation in virtually every aspect of life. This Court has noted:

> [t]he attitude of the city administration [Birmingham's] in general and of its Public Safety Commissioner, in particular, are a matter of public record, of course and are familiar to this Court from previous litigation. . . . The

> United States Commission on Civil Rights found continuing abuse of civil rights protestors by the Birmingham Police, including use of dogs, clubs, and fire hoses.

Walker v. Birmingham, 388 U.S. 307, 325 n. 1 (1967) (Warren, C. J., dissenting). Further, when a federal court ordered the City of Birmingham to desegregate its park and recreation programs in 1962, the City Commission chose instead to close its 68 parks, 38 playgrounds, 6 swimming pools, and 4 golf courses. Such attitudes on the part of governmental leaders made it particularly difficult for blacks to gain meaningful employment as public servants within the State of Alabama. Consequently, when affirmative action remedies were necessary to overcome past discrimination, these remedies, by necessity, had to include more than "good faith" promises to increase minority employment. Instead, affirmative action required more precise mathematical ratios so that actual progress could be measured against a dismal past.

C. *Strong Remedies to Overcome Discrimination Need Not Bar Completely the Advancement of Whites*

This Court has stated on several occasions that public employers "operate under two interrelated constitutional duties. . . . First, they are under a duty to eliminate every vestige of racial segregation and discrimination . . . [and second, to] do away with all governmentally imposed distinctions based on race." *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 8 (May 19, 1986). "These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care." *Id.*

Further, the Court recognizes that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this nation's dedication to eradicating racial discrimination, *innocent persons may be called upon to bear some of the burden of the remedy.*" *Id.* at 12. (Emphasis added).

Clearly, this Court has determined that the use of affirma-

tive action plans to overcome the effects of prior discrimination against blacks is entirely consistent with the Constitution. This Court has measured the level of the burden upon white employees in deciding whether unconstitutional burdens have been imposed upon white employees to remedy previous constitutional violations against minorities. For example, the *Wygant* Court found that the adverse effects of laying off white workers to maintain a racial balance in the work force imposed the "entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant* at 14-15. Therefore, the Court held that such layoff relief was not sufficiently narrowly tailored and therefore failed to satisfy the demands of the Equal Protection Clause.

On the other hand, the *Wygant* Court stated that hiring goals sufficiently spread the imposition of the burden among whites so that a constitutional violation did not exist. The Court reasoned that "[t]hough hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a *future employment opportunity* is not as intrusive as loss of an existing job." *Wygant* at 14. (Emphasis added).

United Steelworkers v. Weber, 443 U.S. 193 (1979), though not an Equal Protection case, weighed four factors to determine that the Kaiser-USWA affirmative action plan was a "permissible" plan under Title VII. The Court found: (1) that the Kaiser plan was "designed to break down old patterns of racial segregation and hierarchy . . ." (2) that "the plan does not unnecessarily trammel the interests of the white employees" (3) that the plan does not "create an absolute bar to the advancement of white employees . . ." and (4) that "the plan is a temporary measure . . ." that would "end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."

These four *Weber* factors bear a resemblance to the Equal Protection analysis offered by the *Wygant* Court. The *Wygant* Court, for example, approved hiring goals but forbade layoffs, echoing the *Weber* Court's concert that affirmative action plans

not unnecessarily trammel the interests of whites. Clearly, layoffs constitute loss of an existing job. In contrast, hiring goals, and by logical extension, promotion goals for minorities affect only future employment opportunities and provide for continued hiring and promotional opportunities for white employees.

As stated, *supra*, the experience of *Amicus* conforms to this analysis. The delays in promotion incurred by the white plaintiffs from the time at which they became eligible for promotion has been of approximately one year's duration. Without a doubt, there is no "absolute bar" to a white employee's promotion. Further, the extent to which the whites' interests are "trammelled" is minimal because the burden is on future employment opportunities and is spread among all whites; moreover, the fact that the whites were hired when there were few or no black employees, reduces to nil the extent to which the whites' interests have been "trammelled."

III. Numerical Remedies Are Appropriate and Are Necessary to Effectuate the Goals of Title VII and Are Not Unfair to Individuals Not Benefited By Them

A. *The Birmingham Decree was Critical to the City's Assuring Equal Employment*

The mandate for race-conscious remedies in this case can be demonstrated by Birmingham's employment history before and after entry of its consent decree. As of January 1, 1966, Birmingham had a total of 9 black employees out of a total of 1,689 employees in its classified service, which consists of higher paying jobs. On the other hand, the unclassified service, which consists primarily of lower paid casual laborers, was predominantly black. In January, 1975, the year the Justice Department sued Birmingham for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominantly black.

The 1979 trial in the *United States v. Jefferson County* litigation confirmed that until relatively recent times, blacks were

excluded from the Birmingham Fire Department as a matter of policy. "White only" restrictions were included in Personnel Board job announcements for firefighter positions with the City, as well as many other classified service jobs, at least until 1958. Even after these restrictions were removed from the announcements, the Birmingham Fire Department remained all white (except for unclassified laborers) until 1968 when the first black was hired as a firefighter.

When the Birmingham Decree was presented to the Court for approval, only 42 (9.3%) of the City's 453 firefighters were black. At no time prior to entry of the Decree had any of the lieutenants, captains or battalion chiefs in that Department been black. The total exclusion of blacks from supervisory positions and their relatively small numbers in the rank of firefighter stood in stark contrast to the City's civilian labor force, 36.5% of which was black according to the 1970 Federal Census.

In short, the history of discrimination both in society in general and in the field of public employment in the City of Birmingham has been of longstanding duration and has required strict and strong measures to overcome. The Birmingham Decree expressly conditions the hiring and promotion of blacks pursuant to the Consent Decree upon their being "qualified" for the positions which they seek. In the 1985 trial, the district court found that "the [hiring and promotion] goals referred to above and set out in paragraph 5, 6 and 8 of the City decree are expressly made subject to the availability of qualified black applicants . . ." findings of fact 123, adopted by the court, Tr. at p. 1347. Thus, the Birmingham Decree did not endanger public safety by promoting unqualified candidates. On the contrary, the City has found that its experience in hiring and promoting blacks within its departments has borne out its belief that City departments, particularly the police and fire departments, are more readily accepted by the community and are more clearly representative of the diverse society which they serve. Justice Stevens recognized in *Wygant* that a racially diverse police department is more likely to be accepted, and therefore effective (particularly in potentially racially explo-

sive situations). *Wygant v. Jackson Board of Education*, 84-1340, slip op. at 3 (May 19, 1986) (Stevens, J., dissenting).

In July, 1981, just before entry of the Birmingham Decree, the effects of past discrimination against blacks persisted in Birmingham's police and fire departments — notwithstanding the district court's race-conscious order in 1977 requiring consideration (but not otherwise requiring *selection*) of more blacks in these departments, and despite Birmingham's adoption of *voluntary* affirmative action plans. *United States v. Jefferson County*, 28 FEP Cases 1834 (BNA) (N.D. Ala. 1981) *aff'd*, 720 F.2d 1511 (11th Cir. 1984). As of July 21, 1981, 79 of Birmingham's 480 police officers were black, 3 of its 131 police sergeants were black, and none of its 40 police lieutenants and captains was black. In the fire department, 42 of the 453 firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black. *Id.*

Clearly, the mere elimination of the long-standing barriers to employment of blacks and females — something that had already been accomplished before entry of the Birmingham Decree — was inadequate to remedy the effects of such pervasive historical discrimination. Real progress in overcoming past discrimination came about only with the imposition of numerical goals in the Birmingham Decree. Since entry of the decree in 1981, opportunities for blacks and females have been enhanced, though not at the expense of qualified white males. In the four years after entry of the decree, Birmingham made 50 police sergeant promotions — 27 white and 23 black; 38 male and 12 female. Of 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. In the Fire and Rescue Service, there were 29 fire lieutenant promotions, 17 white and 12 black. Of the 10 captain promotions, 9 were black and 1 white.

Absent the Consent Decree, this modest progress would not have been made. It is the only mechanism available to the City to assure equal employment opportunity.[6] Yet, without the

[6]This is particularly true since the civil service system under which Birmingham operates places the responsibility for testing and identifying

Consent Decree, Birmingham would be subject to new charges of race and sex discrimination, especially given the nature of an archaic civil service system, which traditionally has been a powerful lobby for the status quo.

B. *One-to-One Promotion Goals Are Necessary to Overcome Discrimination in the Alabama DPS*

It is equally apparent that the race-conscious remedies imposed by consent decree upon the Alabama Department of Public Safety were necessary and appropriate remedies to overcome the effects of past discrimination. Department custom and practice effectively prevented blacks from joining or advancing within the state troopers division. Through the Alabama DPS Decree, however, the Alabama Department of Public Safety, like the City of Birmingham, has made progress in providing equal employment.

The various findings of the district court in *Paradise v. Prescott* lead to an inescapable conclusion: the prior discrimination against blacks by the Alabama Department of Public Safety has been blatant, long-term, and is largely unremedied. In 1972, noting that with the 37 year existence of the Alabama Department of Public Safety there had never been a black state trooper, the district court found "*without contradiction* that the defendants have engaged in a *blatant and continuous* pattern and practice of discrimination in hiring in the Alabama Department of Public Safety." *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972). (Emphasis added). Based on its finding the court ordered the Department to employ one black trooper for every white trooper hired until 25% of the force was black. *Id.* at 706.

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qualified candidates with an independent entity, the Jefferson County Personnel Board, which is subject to a separate consent decree entered contemporaneously with Birmingham's Decree. Without the race-conscious remedies in the Board's decree, namely the requirement that candidate certifications include sufficient numbers of minorities to enable Birmingham to meet its goals, Birmingham would have no mechanism -- as none is provided under state law -- to assure that minorities are even considered for a given job.

Seven years later, the Alabama Department of Public Safety asked for a clarification of the 1972 order petitioning the court on the question of whether the 1972 order required one for one hiring until the entry level rank of the department was 25% black or whether the order required 25% of the entire force to be black. Astonished, the district court noted that "[o]n this point, there is no ambiguity." *Paradise v. Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala. 1979). Further, the court specifically noted that "out of 232 state troopers at the rank of corporal or above, *there is still not one black*." *Id.* at 442. (Emphasis in original). The court added: "To focus only on the entry level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Id.* at 442.

Finally, after consent decrees in 1979 and 1982 that included provisions that required the Alabama Department of Public Safety to develop departmental promotion procedures without adverse racial impact, the respondent filed a motion to enforce the provisions of the decrees. The court noted that about twelve years had elapsed since the 1972 order, but that the Alabama Department of Public Safety still had no black majors, no black captains, no black lieutenants, no black sergeants, and only four black corporals. *Paradise v. Prescott*, 585 F. Supp. at 74. Further, the court found that "the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons." *Id.* at 74.

As the district court noted in 1972, the prior discrimination in the Alabama DPS is "without contradiction." 340 F. Supp. at 705. The various findings of the district courts certainly satisfy this Court's requirement that "*some showing* of prior discrimination by the governmental unit" be made. *Wygant*, slip op. at 6. (Emphasis added). Further, the evidence of prior discrimination is even more clearly shown by the *Hazelwood* standard, that "[w]here gross statistical disparities can be shown, they alone may constitute *prima facie* proof . . . of discrimina-

tion." *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977).

Without a doubt, the Alabama Department of Public Safety has discriminated against blacks. Further, because the government has a "compelling interest in remedying past discrimination," *Sheet Metal Workers v. EEOC*, No. 84-1656, slip op. at 55 (July 2, 1986), the Court must examine the second prong of its Equal Protection analysis.

This Court has cited approvingly the use of numerical goals as an affirmative action remedy. During the 1985 term, the Court stated that "the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." *Sheet Metal Workers v. EEOC*, slip op. at 25. In the case at bar, the district court was clearly faced with these two "unacceptable alternatives."

Both petitioners and respondents agree with this Court, that "in most cases, the court need only order the employer or union to cease engaging in discriminatory practices." *Sheet Metal Workers v. EEOC*, slip op. at 23. The *Sheet Metal Workers* Court also noted, however, that numerical goals may be the only way to require "recalcitrant employers" to overcome previous discrimination. *Id.* "Further, even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's *reputation for discrimination* may discourage minorities from seeking available employment." *Id.* at 24. (Emphasis added). See *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 895 (1974).

Perhaps envisioning the appeal of the case at bar to this Court, the *Sheet Metal Workers* Court cited approvingly the Fifth Circuit's 1974 decision upholding the 1972 one-for-one hiring order in *Paradise*, saying "affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise,

erected by past practices.' *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)." *Sheet Metal Workers v. EEOC*, slip op. at 25.

Again, seemingly laying the groundwork for the case at bar, the *Sheet Metal Workers* Court maintained that "a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides the compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." *Sheet Metal Workers v. EEOC*, slip op. at 25. The district court in *Paradise* was faced precisely with this situation in 1983. The evidence throughout the case had shown "a blatant and continuous pattern and practice of discrimination hiring." *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). Further, promotional procedures required under the 1979 and 1981 Consent Decrees had virtually been ignored and "the department is still without acceptable procedure for an advancement of black troopers into this structure, and it does not appear that any procedure will be in place within the near future." *Paradise v. Prescott*, 585 F. Supp. at 74. Faced with the "two unacceptable alternatives," and realizing that "the defendants need additional corporals and that they need at least fifteen of them as soon as possible," *Paradise v. Prescott*, 580 F. Supp. 171, 173 (M.D. Ala. 1983), the district court fashioned a remedy that was tailored to achieve its purpose: to promote black state troopers to the ranks of officers within the Alabama Department of Public Safety.

Reviewing the record of twelve years of court orders, appeals, and two consent decrees, it was clearly evident that the only successful remedy throughout the whole period of litigation had been the district court's original 1972 order requiring one-for-one hires within the department. Based on the recalcitrance of the Alabama Department of Public Safety to move beyond the strict interpretation of the order requiring one-for-one hires, the district court ordered one-for-one promotions until 25% of the officers in the ranks of the Alabama Department

of Public Safety were black. *Paradise v. Prescott*, 585 F. Supp. at 75.

C. *Race-Conscious Remedies Are Fair to White Employees*

Notwithstanding the emotional outcries of the present administration, race-conscious remedies of the kind challenged by petitioners are not unfair to members of the historically favored race. Since race-conscious remedies are imposed to eradicate the effects of historical discrimination, such remedies will not unfairly injure third parties if the remedies are carefully constructed to integrate the disadvantaged class into the workforce to the degree that would have occurred absent discrimination. In many situations, one possible measure of the degree of minority participation in a non-discriminatory environment is the percentage of minorities in the community's labor force. When a white employee has *benefited* by the discrimination, it is not unfair to retard his future promotions to make way for blacks or women as long as the *number* of blacks or women hired does not exceed the relative *number* of blacks or women that would have been hired absent discrimination. The impact on the favored class members is the same whether the proven victims receive their rightful places or whether the same number of persons (potential though not proven victims) occupy those places.[8]

For example, the City of Birmingham has found that the burden imposed upon white employees in the promotion of

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[8]This argument was presented to this Court by the government in 1979 in its defense of voluntary affirmative action and applies equally to affirmative action incorporated in a court decree:

> Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified.

U.S.A./E.E.O.C. *Weber* brief at 58.

qualified blacks pursuant to the Birmingham decree, has been modest. Of the 17 white employees involved in the 1985 trial of the Birmingham Reverse Discrimination Litigation, 14 have been promoted to those positions to which they originally became eligible (not entitled), and for which they were passed over. The delays in the promotions which they eventually obtained ranged from 3 weeks to 220 weeks. The average delay in promotion was 62 weeks. These temporary delays in promotion are far outweighed by the need to remedy the effects of the City's past pervasive discrimination in public employment.

Further, the significance of the delays of the promotions of the white fire and engineering plaintiffs in the Birmingham Reverse Discrimination Litigation was minimal when one looks at the extent to which the white plaintiffs benefited from the City's previous discrimination in employment. Of the 17 white plaintiffs, 10 were hired by the City of Birmingham at a time when there were no black employees in the department in which the plaintiffs were employed and when the only competition for Fire Department jobs was among whites. Four of the white plaintiffs were hired by the City when there was 1 black employee in the department in which the whites were employed. Two of the white plaintiffs were hired at a time when there were 10 black employees in the department. Clearly, the white plaintiffs in the Birmingham Reserve Discrimination Litigation were the certain beneficiaries of the City's previous employment discrimination. This fact, coupled with the short duration of the delay in promotion of whites by the City pursuant to the City Decree minimizes the burden shared by whites in remedying the effects of prior discrimination. *See Wygant*, slip op. at 12; *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Further, any concern that employers will bargain away rights of non-minority employees to avoid the expense of litigation is unwarranted. As long as the district court has the responsibility to assure that the numerical impact of the Decree's affirmative action provisions approximates the impact that non-discrimination would have had upon the favored class, then

non-minorities will not be injured. Moreover, in considering the fairness of any class action settlement, the district court should evaluate the fairness of the proposed settlement upon class members as well as upon employees who may be affected by the settlement. In evaluating whether settlement is fair and adequate, the district court should apply this Court's guidelines for voluntary affirmative action as first discussed in *Weber*. This approach is not novel, unmanageable, nor impracticable. It is the very approach followed routinely by district courts in approving consent decrees, including the district court in Birmingham's Title VII litigation, and by appellate courts in reviewing the appropriateness of race-conscious remedies whether imposed by consent decree or otherwise.

Thus, the legitimate interests of non-minorities are protected by the court when it considers whether race-conscious remedies are necessary and appropriate. Relevant to this determination is whether the relief is temporary and terminates when manifest racial imbalances are eliminated, whether there is evidence of historical discrimination, whether the discrimination was intentional, whether the relief does not unnecessarily trammel interests of whites by effectively barring their advancement or requiring their discharge and replacement with blacks, and whether beneficiaries of the relief are qualified for any employment opportunity conferred. *See Weber*, 443 U.S. at 208; *Paradise, supra*, 767 F.2d at 1527-34.

An employer's self-interest in limiting litigation costs by entering into consent decrees, therefore, does not threaten legitimate interests of incumbent employees. This Court's prior decisions in *Weber* and *Stotts* and the lower courts' role in assuring that race-conscious remedies comport with those decisions provide genuine protection to incumbent employees. Moreover, the employer's cost-consciousness is by no means an improper motivation for settlement. When the fact of discrimination is not a debatable matter, protracted litigation only perpetuates the discrimination, further entrenches its effects, delays relief to plaintiffs, and consumes financial resources that might otherwise be utilized to meet municipal obligations.

Birmingham readily admits that one of its incentives to enter into its Consent Decree was to avoid further protraction of litigation which was in its seventh year and had cost tens of thousands of dollars, yet was guaranteed to last many more years and cost thousands of more dollars before all issues covering all City departments were finally tried. That seemingly interminable litigation would have been successfully concluded by the 1981 consent decree had it not been for the irresponsible reading, by the government and by some reverse discrimination plaintiffs, of this Court's decision in *Stotts*. In the months since *Stotts* was decided, Birmingham has expended hundreds of thousands of dollars defending – from governmental and private challenge – the very remedies sought by the government and carefully approved by the court in 1981.

The City cannot believe that this Court intends to erect a barrier to settlement, or to deprive the lower courts of such a valuable tool to remedy effects of past discrimination regardless of the case's circumstances. Rather, clarification is needed to resolve a conflict between the lower courts, on the one hand, and the United States and private parties, on the other hand. By affirming the decisions below, this Court would preserve a necessary and lawful remedy under Title VII and the Fourteenth Amendment which courts have used successfully for many years.

CONCLUSION

For the reasons stated, the judgments of the Court of Appeals should be affirmed.

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